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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 490

EDWARD P. STAHEL & CO., INC.; INTERSTATE HOSIERY MILLS, INC.; LIBERTY LACE & NETTING WORKS, A CORPORATION; COOPER, WELLS & COMPANY; MAY McEWEN KAISER COMPANY; OSCAR HEINEMAN CORPORATION; SAKURA MILLS, INC.; C. J. ABEGG AND EMIL RINGGER, DOING BUSINESS AS ABEGG & COMPANY; REAL SILK HOSIERY MILLS, INC.,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The petitioners, Edward P. Stahel & Co., Interstate Hosiery Mills, Inc., Liberty Lace & Netting Works, Cooper, Wells & Company, May McEwen Kaiser Company, Oscar Heineman Corporation, Sakura Mills, Inc., C. J. Abegg and Emil Ringger, doing business as Abegg & Company, and Real Silk Hosiery Mills, Inc., pray that a writ of certiorari

issue to review the judgment of the Court of Claims entered in the above-referred-to actions on June 28, 1948.

Opinion Below

The opinion of the Court of Claims (R. 97) is reported at 78 Fed. Supp. 800.

Jurisdiction

The judgment of the Court of Claims was entered on June 28, 1948 (R. 109). A motion for a new trial, seasonably filed, was overruled on October 4, 1948 (R. 110). The jurisdiction of this Court is invoked under the Act of February 13, 1925, C. 229, Section 3, 43 Stat. 939, as amended May 22, 1939, C. 140, 53 Stat. 752, 28 U. S. C. A. 288.

Questions Presented

1. In enforcing the constitutional requirement of just compensation for the taking of all of the raw silk in the United States for public use, is the proper standard of just compensation the arbitrarily determined ceiling price of $3.08 a pound fixed subsequently by the Office of Price Administration and Civilian Supply at a time when there was no statute authorizing the establishment of a maximum price on raw silk, when no standards had been prescribed for such official action and when there were no provisions for legal protest or judicial review of the price-fixing order, as found by a majority of the Court of Claims, rather than the fair value in the last prevailing free market?

2. Did the taking of petitioners' property occur on July 26, 1941, when in furtherance of a plan for the acquisition by the Government of all the raw silk in the United States for military purposes, the Government prohibited the use or delivery of raw silk and terminated the then existing free commercial market in silk, rather than as found by the Court

of Claims on October 16, 1941, when delivery of raw silk to the Government was expressly required?

Statutes Involved

The pertinent portion of the Fifth Amendment to the Constitution of the United States is as follows:

> "... nor shall private property be taken for public use, without just compensation."

The Act of June 28, 1940 (54 Stat. 676) as amended by the Act of May 31, 1941 (55 Stat. 236) is set forth in Appendix A, pp. 13, 14.

Statement

The nine petitioners herein brought suit in the Court of Claims against the United States pursuant to Section 145 of the Judicial Code (36 Stat. 1136; Title 28, Sec. 250(1), U. S. C.) to recover further compensation due them by the defendant under an implied promise on the part of the defendant to pay just compensation, as required by the Fifth Amendment to the Constitution of the United States, for the taking of raw silk owned by the petitioners for the use of the defendant.

During and previous to the year 1941, petitioners were manufacturers of or dealers in raw silk. The raw silk, which is involved in these proceedings, was owned by and in the possession of the petitioners on July 26, 1941, and was taken by the United States for public use on orders for delivery to the Defense Supplies Corporation, an agency of the defendant. The price received by the petitioners for their silk was the ceiling price fixed by the Office of Price Administration and Civilian Supply, the ceiling price established for the standard grade of Japanese silk being $3.08 a pound.

As will be more fully set forth hereinafter, all the raw silk in the United States was frozen on July 26, 1941. The

last day on which raw silk was bought and sold on an open and free market was July 25, 1941. All the raw silk was subsequently acquired by the Government for military purposes.

New York City was the principal market in the United States for raw silk. "Future" contracts in raw silk were traded on the New York Commodity Exchange. In addition, most of the manufacturers and dealers in raw silk had offices in New York City, and bought and sold silk in what was called the "uptown" or "spot market", usually by direct sales rather than on the Commodity Exchange. The greater part of the silk purchased for consumption in this country was purchased in this spot market. The closing price for the standard grade of silk, for which the ceiling price had been set at $3.08 a pound, was $3.57 on the spot market and $3.65 on the Commodity Exchange. The Board of Governors of the Commodity Exchange on October 15, 1941 ruled that future silk contracts outstanding at the time trading in silk was suspended on July 26, 1941, must be liquidated by both buyers and sellers at the closing prices on July 25, 1941. The action taken by the Commodity Exchange was affirmed by the Circuit Court of Appeals, Second Circuit, on May 1, 1944, *Crowley* v. *Commodity Exchange*, 141 F. (2d) 182. In that case, the District Court of the Southern District of New York had found on appropriate evidence that the closing prices on the Exchange on July 25, 1941, ranging from $3.55 to $3.65, varying with the delivery month, were fair and reasonable and represented the fair market value of raw silk.

During the week of July 21 to 25, 1941 approximately 15 to 20 per cent of the silk in the United States at that time was bought and sold at the prevailing market prices ranging from $3.04 to $3.65 a pound. After July 25, 1941, the prices of commodities generally continued upward, and

without the taking by the Government the price of raw silk would also have increased. After July 25, 1941, the price of thrown or processed silk, which under normal conditions maintained an average of about $1.00 a pound over the price of raw silk, increased substantially and sold for $5.50 a pound during August, 1941 and for as much as $15.00 a pound in February, 1942. Between July, 1941 and March, 1942 some Brazilian silk was offered to the United States Government at $5.50 a pound. In February, 1946 the War Assets Corporation sold at auction 3,308 bales of surplus raw silk at an average price of $11.75 a pound. These 3,308 bales had been acquired by Defense Supplies Corporation, a Government agency, from petitioners and other silk owners who were required to deliver their silk at the ceiling price fixed by the Office of Price Administration and Civilian Supply. Some of the silk owners repurchased from the War Assets Corporation at the auction prices the identical silk which they had turned over to the Defense Supplies Corporation.

The petitioners take the position that their raw silk, which is the subject of their claims, was taken by the United States for public use at a price substantially below the fair and reasonable value of their property which was fixed by an administrative agency without valid authority; that such acquisition of their property was determined upon and carried into effect under a definite plan to withdraw all the available raw silk in the United States from commercial use for defense purposes without payment of the fair market value.

After the outbreak of World War II in Europe, the defendant, realizing that there might be a shortage of vital materials which would be needed for public use if this country became involved in the war, entered upon a defense program. On January 7, 1941 the President issued Execu-

tive Order No. 8629 which set up the Office of Production Management within the Office of Emergency Management and provided for a Division of Priorities within the Office of Production Management. On April 11, 1941, under Executive Order No. 8734 (6 F. R. 1917), the President established the Office of Price Administration and Civilian Supply, authorizing said office to determine and publish maximum prices after proper investigation, and take all lawful steps to facilitate their observance. To all intents and purposes the Office of Price Administration and Civilian Supply was an independent agency, with authority in the price field coordinate with that of the Office of Production Management in the field of industrial organization. The Price Division of the Office of Price Administration and Civilian Supply was set up on May 1, 1941 in order to carry on the work of issuing price schedules.

After the establishment of the Office of Price Administration and Civilian Supply, a joint committee of the Office of Production Management and Office of Price Administration officials existed for the purpose of coordinating policies with respect to various commodities including silk.

Recognizing that the defense program would create commodity shortages, Congress, on May 31, 1941 (C. 157, 55 Stat. 236, Public Law No. 89) delegated authority to the President to allocate scarce supplies. The provisions of this Act are set forth in Appendix A. The authority to allocate various commodities was delegated to the Office of Production Management and exercised through a variety of administrative expedients, among them priority orders.

Sometime prior to July 26, 1941 the defendant decided to create a stockpile of raw silk and through its agency, Defense Supplies Corporation, contracted with a broker for the purchase of 50,000 bales of raw silk in the open market.

On July 24, 1941 the authority to purchase said silk was rescinded.

On the afternoon of July 25, 1941 the President announced that he intended to terminate commercial relations with Japan, and on the following day he issued Executive Order No. 8832 which froze all Japanese assets in the United States and terminated commercial relations with Japan, including commercial relations in raw silk. Simultaneously, the Office of Production Management, purportedly acting pursuant to the authority conferred by the Act of June 28, 1940 (54 Stat. 676) as amended by the Act of May 31, 1941 (55 Stat. 236), issued General Preference Order M-22 which prohibited delivery or processing of raw silk without the specific authorization of the Director of Priorities, which order had the effect of freezing all the raw silk in the United States. On August 12, 1941 the order was amended and authorized deliveries only to the Defense Supplies Corporation or pursuant to its instructions. On October 16, 1941 the order was further amended to *require* acceptance of any contract or order for raw silk placed by the Defense Supplies Corporation or by certain defense departments of the Government or orders for silk for physical incorporation in Government materials.

On Saturday, July 26, 1941 the market being closed, the Administrator of the Office of Price Administration and Civilian Supply advised the Commodity Exchange by telegram to suspend trading in silk. The Commodity Exchange, which was the only market in New York for the purchase and sale of future contracts in raw silk, thereupon suspended all trading in raw silk, including current month's deliveries. The last day on which it was open as a market for buying and selling of raw silk was July 25, 1941. Thereafter and continuing until after the termination of the War,

raw silk was purchased and sold only in accordance with and for the uses prescribed by Government regulations.

On the same day, July 26, 1941, the Administrator of the Office of Price Administration and Civilian Supply announced that his office would, within a few days, impose a price ceiling on raw silk at approximately the level that had prevailed in the markets on Monday, July 21, 1941. This announcement was made without prior consultation or discussion of prices with the representatives of the silk industry or any of the petitioners herein, and without notice or opportunity to submit information or argument to support a different price ceiling.

On August 2, 1941 the Office of Price Administration and Civilian Supply issued Price Schedule No. 14, establishing maximum prices for raw silk. In issuing the price schedule the Price Administrator made no specific findings. The price ceiling for the standard grade of raw silk was fixed at $3.08 a pound. The closing price for the same grade on July 25, 1941, the last day there was trading in silk in a free market, was $3.65 on the Commodity Exchange and $3.57 on the spot market. Related prices for other grades were also fixed.

Representatives of the silk industry, individually and in groups, expressed dissatisfaction with the prices established in the said Price Schedule No. 14, vigorously protested them and endeavored to obtain a modification and increase of the ceiling prices, but their efforts were unavailing. All of the petitioners' raw silk owned by them on July 26, 1941 was thereafter held for the Government and delivered by them on orders of the Defense Supplies Corporation placed after October 16, 1941 at the ceiling price.

At the time the Office of Price Administration and Civilian Supply issued Price Schedule No. 14 on August 2, 1941, there was no statutory authority for the establishment of

ceiling prices on silk or other commodities. No standards, conditions or limitations had been prescribed for the official action of the Price Administrator in establishing maximum prices. It was not until the passage of the Emergency Price Control Act (56 Stat. 28) on January 30, 1942 that Congress enacted legislation to provide for price control for commodities in general consumption with standards to satisfy constitutional requirements for the guidance of the Administrator in fixing ceiling prices and provisions for legal protest and judicial review of the orders of the Administrator. The Act required reissuance of any price control order if it was to be effective.

Price Schedule No. 14 was revoked on February 18, 1942 for the stated reason that "substantially all stocks of silk in the country have been acquired by the United States Government, through agencies thereof, or are presently in the hands of manufacturers fabricating materials in fulfillment of Government contracts." The price schedule on silk was never reissued.

The Court of Claims, in its decision of June 28, 1948, unanimously found that there had been a taking of petitioners' raw silk by the defendant for public use. A majority of three members of the Court found that as of October 16, 1941, the date of the amendment to General Preference Order M-22 which in terms required acceptance of orders placed by Defense Supplies Corporation, there was no market for raw silk in the usual sense and that the Court must make its decision as to just compensation out of such materials as were at hand. A majority of three members of the Court also found that whether authorized or not, the process by which the Office of Price Administration arrived at the ceiling price of $3.08 seemed to them to have been fair and reasonable, and they adopted that price as just compensation for the silk taken. Two of the five members of the

Court agreed that $3.08 did not represent just compensation and that the nearest the Court could come to fixing just compensation for the taking of petitioners' silk was the price petitioners could have gotten for their silk on the last day there was a free market for it. They stated that under the facts in this case the ceiling price of $3.08, fixed by the Office of Price Administration and Civilian Supply, had no legal effect in the determination of just compensation and that the petitioners were entitled to recover at the rate of $3.57 a pound.

Motions for a new trial filed by petitioners and by the Government were overruled.

Specification of Errors

The Court below erred:

1. In determining that $3.08 per pound, the ceiling price for standard silk fixed by the Office of Price Administration and Civilian Supply, represented just compensation for the raw silk taken from the petitioners by the defendant.

2. In finding that the Government took the petitioners' raw silk for public use within the meaning of the Fifth Amendment on October 16, 1941, rather than on July 26, 1941.

Reasons for Granting the Writ

1. The important constitutional questions presented by this petition have not heretofore been decided by this Court.

2. Without review on certiorari a three-to-two opinion of the Court of Claims will establish a precedent for determination of constitutional compensation for the taking of a commodity, the use or delivery of which was completely prohibited for any except defense purposes of the United States, without supporting evidence other than a price fixed

by an administrative agency, acting without statutory authority or prescribed standards and conditions for official action and without provisions for contemporaneous legal protest or judicial review. In the decisions which have held that the ceiling price was the determinant of just compensation for property taken by the Government, the price had been duly promulgated under a statute, there existed a market in which parties other than the Government bought and sold at the controlled price, or the price was agreed to by members of an industry who voluntarily sold their products at the fixed price which uniformly prevailed at the time the property was taken.

3. Unless reviewed by this Court, the acceptance as just compensation for the taking of property of a price which was fixed by an administrative agency as a part of a plan for the acquisition of all of the raw silk in the United States for public use at less than the price at which such silk was freely traded without knowledge of such intended taking, will be established as compliance with the constitutional requirement for the payment of just compensation.

4. Without review by this Court, it will be established as a precedent that a taking of private property for public use under successive restrictions and regulations prohibiting private use or disposition does not violate the Constitution so as to constitute a complete taking until the mandatory requirement of *delivery* to the Government is specifically expressed.

5. Without review by this Court, the misuse of regulatory power intended to prevent inflation in the public interest in emergencies, to acquire property at unjustly low prices for resale by the Government for private use at inflated prices, will be encouraged.

Conclusion

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM A. ROBERTS,
Attorney for Petitioner.

Of Counsel:
IRENE KENNEDY,
WARREN WOODS,
ROBERTS & MCINNIS,
735 Transportation Building,
Washington 6, D. C.

APPENDIX A

Act of May 31, 1941 (55 Stat. 236)

AN ACT to amend the Act approved June 28, 1940, entitled "An Act to expedite the national defense, and for other purposes", in order to extend the power to establish priorities and allocate material.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act approved June 28, 1940 (Public, Numbered 671, Seventy-sixth Congress), as amended, is amended by inserting "(1)" after "Sec. 2. (a)" and by adding at the end of subsection (a) thereof the following:

"(2) Deliveries of material to which priority may be assigned pursuant to paragraph (1) shall include, in addition to deliveries of material under contracts or orders of the Army or Navy, deliveries of material under—

"(A) contracts or orders for the Government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled 'An Act to promote the defense of the United States';

"(B) contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States; and

"(C) subcontracts or suborders which the President shall deem necessary or appropriate to the fulfillment of any contract or order as specified in this section.

Deliveries under any contract or order specified in this section may be assigned priority over deliveries under any other contract or order. Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or for private account or for export, the President may allocate such material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. The President shall be entitled to obtain

such information from, require such reports by, and make such inspection of the premises of, any person, firm, or corporation as may be necessary or appropriate, in his discretion, to the enforcement or administration of the provisions of this section. No person, firm, or corporation shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from his compliance with any rule, regulation, or order issued under this section. The President may exercise any power, authority, or discretion conferred on him by this section, through such department, agency, or officer of the Government as he may direct and in conformity with any rules and regulations which he may prescribe."

APPENDIX B

Executive Order No. 8734, 6 F.R. 1917

ESTABLISHING THE OFFICE OF PRICE ADMINTRATION AND CIVILIAN SUPPLY IN THE EXECUTIVE OFFICE OF THE PRESIDENT AND DEFINING ITS FUNCTIONS AND DUTIES

By virtue of the authority vested in me by the Constitution and the Statutes, and in order to define further the functions and duties of the Office of Emergency Management with respect to the national emergency as declared by the President on September 8, 1939, for the purpose of avoiding profiteering and unwarranted price rises, and of facilitating an adequate supply and the equitable distribution of materials and commodities for civilian use, and finding that the stabilization of prices in the interest of national defense and that this Order is necessary to increase the efficiency of the defense program, it is hereby ordered:

1. There shall be in the Office for Emergency Management of the Executive Office of the President an Office of Price Administration and Civilian Supply, at

the head of which shall be an Administrator appointed by the President. The Administrator shall receive compensation at such rate as the President shall determine and, in addition, shall be entitled to actual and necessary transportation, subsistence, and other expenses incidental to the performance of his duties.

2. Subject to such policies, regulations, and directions as the President may from time to time prescribe, and with such advice and assistance as may be necessary from the other departments and agencies of the Federal Government, and utilizing the services and facilities of such other departments and agencies to the fullest extent compatible with efficiency, the Administrator shall:

a. Take all lawful steps necessary or appropriate in order (1) to prevent price spiraling, rising costs of living, profiteering, and inflation resulting from market conditions caused by the diversion of large segments of the Nation's resources to the defense program, by interruptions to normal sources of supply, or by other influences growing out of the emergency; (2) to prevent speculative accumulation, withholding, and hoarding of materials and commodities; (3) to stimulate provision of the necessary supply of materials and commodities required for civilian use, in such manner as not to conflict with the requirements of the War, Navy, and other departments and agencies of the Government, and of foreign governments, for materials, articles, and equipment needed for defense (such requirements are hereinafter referred to as "military defense needs"); and (4) after the satisfaction of military defense needs, to provide, through the determination of policies and the formulation of plans and programs, for the equitable distribution of the residual supply of such materials and commodities among competing civilian demands.

b. Make studies of the Nation's civilian requirements for materials and commodities, the supply of goods and services, the status and trend of prices and

factors thereof, and the impact of the defense program upon civilian living standards; exercise the powers of the President in requesting such studies pursuant to Section 336(a) of Title III of the Tariff Act of 1930 (Title 19 U.S.C., Sec. 1336 (a); and conduct of such investigations, hold such hearings, and obtain such reports as may be necessary or desirable to carry out this Order.

c. Determine and publish, after proper investigation, such maximum prices, commissions, margins, fees, charges, or other elements of cost or price of materials or commodities, as the Administrator may from time to time deem fair and reasonable; and take all lawful and appropriate steps to facilitate their observance.

d. Advise and make recommendations to other departments and agencies, whenever the Administrator deems it appropriate, in respect to the purchase or acquisition of materials and commodities by the Government, the prices to be paid therefor, and in respect to such of their other activities as may affect the price of materials and commodities.

e. Inform the Office of Production Management of the amount, character, and relative importance of materials and commodities needed for civilian use; and advise and consult with the Office of Production Management with reference to its procurement, production planning, priority, and other actions the effect of which may be to diminish the supply of materials and commodities available for civilian use.

f. Establish and maintain liaison with such departments and agencies of the Government and with such other public or private agencies and persons as the Administrator may deem necessary or desirable to carry out the provisions of this Order.

g. Formulate programs designed to assure adequate standards for, and the most effective use of, consumer goods; stimulate the utilization of substitutes by civilians for consumer goods and commodities of limited

supply; develop programs with the object of stabilizing rents; and promote civilian activities which will contribute to the purpose of this Order.

h. Recommend to the President the exercise of the authority vested in him by the following named Acts, whenever, in the opinion of the Administrator, such action by the President will enable the Administrator to carry out and secure compliance with the provisions of Section 2a and 2c of this Order:

(1) Section 9 of the Selective Training and Service Act of 1940 (Public No. 783, 76th Congress).

(2) Section 120 of the National Defense Act (Title 50, U.S.C., Sec. 80).

(3) Section 1(15) of Title 49, U.S.C.

(4) The Act of October 10, 1940 (Public No. 829, 76th Congress).

i. Perform the functions and exercise the authority vested in the President by the following named Acts, in so far as and only to the extent that the authority conferred by such Acts will, in the opinion of the Administrator, enable him to carry out and secure compliance with the provisions of Section 2a and 2c of this Order: Section 713 (a)-7 of Title 15, U.S.C., Supp. V; Section 4 of the Act approved June 7, 1939 (Title 50, U.S.C., Supp. V., Sec. 98c); and Section 5 of the Reconstruction Finance Corporation Act, as amended by the Act approved June 25, 1940 (Public No. 664, 76th Congress): subject to the disapproval by the Secretary of War or the Secretary of the Navy of each proposed action thereunder.

j. Advise upon proposed or existing legislation, and recommend such additional legislation as may be necessary or desirable, relating to prices, rents, or the increase in supply and the equitable distribution of materials and commodities for civilian use.

k. Keep the President informed in respect to progress made in carrying out this Order; and perform such other related duties as the President may from time to time assign or delegate to him.

3. The Administrator may provide for the internal organization and management of the Office of Price Administration and Civilian Supply, and may appoint such advisory committees as he finds necessary to the performance of his duties and responsibilities. The Administrator shall obtain the President's approval for the establishment of the principal subdivisions of the Office and the appointment of the heads thereof.

4. There shall be in the Office of Price Administration and Civilian Supply a Price Administration Committee consisting of the Administrator as Chairman, the Secretary of the Treasury, the Secretary of Agriculture, the Federal Loan Administrator, the Chairman of the Tariff Commission, the Chairman of the Federal Trade Commission, the Director General and Associate Director General of the Office of Production Management, or such alternate as each may designate, and such other members as the President may subsequently appoint. The Committee shall from time to time, upon request by the Administrator, make findings and submit recommendations to the Administrator in respect to the establishment of maximum prices, commissions, margins, fees, charges, and other elements of cost or price of materials or commodities as provided under paragraph 2c above.

5. Within the limits of such funds as may be appropriated to the Office of Price Administration and Civilian Supply or as may be allocated to it by the President through the Bureau of the Budget, the Administrator may employ necessary personnel and make provision for necessary supplies, facilities, and services. However, the Office of Price Administration and Civilian Supply shall use such statistical, informational, fiscal, personnel, and other general business services and facilities as may be made available to it through the Office for Emergency Management or other agencies of the Government.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE
April 11, 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 490

EDWARD P. STAHEL & CO., INC.; INTERSTATE HOSIERY MILLS, INC.; LIBERTY LACE & NETTING WORKS, A CORPORATION; COOPER, WELLS & COMPANY; MAY McEWEN KAISER COMPANY; OSCAR HEINEMAN CORPORATION; SAKURA MILLS, INC.; C. J. ABEGG AND EMIL RINGGER, DOING BUSINESS AS ABEGG & COMPANY; REAL SILK HOSIERY MILLS, INC.,

Petitioners,

vs.

THE UNITED STATES

BRIEF IN SUPPORT OF PETITION

Introductory Statement

Reference is made to the Petition for a Writ of Certiorari for the Opinion Below, Jurisdiction, Questions Presented, Statutes Involved, Statement of the Case and Specification of Errors.

Summary of Argument

The Court of Claims concluded that the petitioners' raw silk was taken by the United States for public use and that under the Fifth Amendment to the Constitution the sovereign was required to pay just compensation for the property taken. As the basis for determining just compensation to which petitioners were entitled, the majority of the Court applied the ceiling price of $3.08 per pound which had been fixed by the Office of Price Administration and Civilian Supply in Price Schedule No. 14 issued by that office on August 2, 1941 (R. 104). Two of the five members of the Court joined in finding that market prices of silk governed just compensation.

The Court further held that the Government's taking of petitioners' silk for public use became effective by its order of October 16, 1941, an amendment to General Preference Order M-22, which required petitioners to sell their property to those who would use it for the Government's purposes or to the Government itself, and which forbade the delivery or use of raw silk for any other purpose (R. 102).

In the development of the argument in this case, we will undertake to show that the Court of Claims has not based its decision upon the pertinent evidence of record and has erred in two vital respects.

In the first place, the Court of Claims has made an erroneous finding that the value of petitioners' raw silk taken by the Government must be fixed at $3.08 per pound, the ceiling price arbitrarily established by the Office of Price Administration and Civilian Supply (O. P. A. C. S.) and the determination of just compensation on the basis of such a ceiling price violates the principles enunciated by this Court and applied for ascertaining just compensation. This finding is erroneous because:

(1) The price schedule was issued by the O. P. A. C. S. with no statutory authority. The silk was taken by the Government, as the Court has found, many months before the passage of the Emergency Price Control Act of January 30, 1942, the first statutory enactment of commodity price control.

(2) The Constitution confers neither express nor implied power upon the Executive branch of the Government to fix commodity prices in the absence of specific legislative authority.

(3) Price fixing without adherence to any legislative standards, except such arbitrary judgment as the O. P. A. C. S. might see fit to employ, and without any provisions for protest or judicial review of the price-fixing regulations can have no effect in the determination of just compensation.

(4) The taking of the silk by the Government for purposes of national defense and payment therefor at a price fixed by naked executive authority without congressional sanction does not establish the measure of just compensation under the Constitution.

The Government did not fix the price of silk in order to control the civilian market, as all trading in the commodity had been suspended, but instead it did so with the predominant purpose of acquiring the property affected by the price-fixing order and proceeded thereupon to carry out that purpose.

(5) Accordingly, the Court of Claims erred in allowing this case to be controlled by those opinions where a valid legislative price had been fixed, thus establishing a market for civilian trading in the commodity.

(6) The price schedule fixing the ceiling price on raw silk was not ratified by the passage of the Emergency Price Control Act of 1942.

(7) The determination of just compensation should be judicially made and it is error for the Court to accept an invalid administratively fixed price as a proper determination thereof.

(8) The finding that the ceiling price of $3.08 per pound represented fair value of the silk taken is without substantial foundation in the evidence and the considerations which guide the Court in this conclusion are not pertinent to the issue of what was fair value at the time of the taking.

(9) The undisputed competent evidence is that the value of the silk on July 26, 1941 was $3.65 per pound on the Commodity Exchange or $3.57 on the spot market; that the value thereof was mounting steadily so that the value of the silk as of October 16, 1941 was far in excess of the value on July 26, 1941.

(10) The transactions in raw silk after July 26, 1941 at the ceiling price did not establish a market value for the silk which could be used in ascertaining just compensation in accordance with judicial principles.

In the second place, the Court erroneously held that the date of the taking of the silk by the United States was October 16, 1941. The petitioners maintain that the date of the taking was July 26, 1941 because:

(1) On that date when the Government issued General Preference Order M-22, suspended trading in silk and announced that a price would be fixed at the level of the prices prevailing on July 21, 1941, it knew that all available raw silk would be needed for its own use and had planned to acquire it for that use.

(2) The economic and political forces which were at work, together with the pressures exerted by the Government,

compelled the silk owners to hold all the raw silk they had in their possession on July 26, 1941 until they received orders to deliver to the Government or its agency or contractors for Government use.

(3) The priority order of July 26, 1941 deprived petitioners of the use and benefit of their property and their ownership ended for all practical purposes on that date when the Government took control of all the raw silk in the United States. This order was not a regulation of the use of a commodity for the public benefit but was in effect a requisition of petitioners' property for public use.

ARGUMENT

A. The Ceiling Price of $3.08 Per Pound Is Not the Proper Standard for the Determination of Just Compensation for Petitioners' Raw Silk Taken by the United States

1. The Ceiling Price of $3.08 Per Pound On Raw Silk Was Not Constitutionally or Lawfully Established and Could Have No Legal Effect in the Determination of Just Compensation for Petitioners' Silk as Required Under the Fifth Amendment.

a. There Was No Statutory Authority For Price Control on August 2, 1941

On August 2, 1941 Price Schedule No. 14, fixing maximum prices on raw silk was formally issued by the Office of Price Administration and Civilian Supply. There was not only no express statute giving the President or any Government Agency authority to fix prices, but there was no statute from which such authority could be implied.

Executive Order No. 8734, April 11, 1941 (6 F. R. 1917) established the Office of Price Administration and Civilian Supply and purported to authorize that office to determine

and publish maximum prices after proper investigation, and to take all lawful steps to facilitate their observance. O. P. A. C. S. became a part of the Office of Emergency Management of the Executive Office of the President, and by another Executive Order, No. 8875 of August 28, 1941, its name was changed to the Office of Price Administration.

Executive Order No. 8734 creating O. P. A. C. S. refers to the following statutes as being involved in the functions of that agency:

Section 336(a) of Title III of the Tariff Act of 1930 (Title 19, U. S. C. Sec. 1336(a)) authorizes the Tariff Commission to investigate differences in cost of production of any domestic article and of any like or similar foreign article and report to the President the results of its investigation, and specify in its report such increases or decreases in rate of duty expressly fixed by statute to be necessary to equalize any differences in cost of production of the domestic article and the like foreign article when produced in the principal competing country.

Section 9 of the Selective Training and Service Act of 1940 (Public Law No. 783, 76th Congress) provides for the commandeering of plants of concerns which refuse to comply with Army and Navy orders.

Section 120 of the National Defense Act (Title 50, U. S. C. Sec. 80) also concerns commandeering of plants by the President in time of war or when war is imminent.

Section 1(15) of Title 49, U. S. C. provides that in case of emergency the Interstate Commerce Commission shall have certain powers, and in time of war or threatened war the President may certify to the Commission that it is essential to the national defense that certain traffic shall have preference in transportation.

The Act of October 10, 1940 (Public No. 829, 76th Congress) empowers the President to requisition materials

ordered, manufactured, procured or possessed for export purposes.

Section 713(a)-7 of Title 15, U. S. C. relates to the exchange of surplus agricultural commodities for reserve stocks of strategic material.

Section 4 of the Act approved June 7, 1939 (Title 50, U. S. C., Supp. V, Sec. 98c) relates to the acquisition of strategic raw materials and provides that materials acquired except for rotation shall be used only upon the order of the President in time of war or when he shall find that a national emergency exists with respect to national defense as a consequence of the threat of war.

Section 5 of the Reconstruction Finance Corporation Act, as amended by the Act approved June 25, 1940 (Public No. 664, 78th Congress) provides that in order to aid the United States Government in its national defense program, the Reconstruction Finance Corporation is authorized to make loans for the purpose of producing and acquiring strategic materials and for plant construction, expansion and equipment and working capital to be used in the manufacturing of equipment and supplies necessary to the national defense.

None of the aforementioned statutes specifically authorized or purported to authorize the fixing of prices by O. P. A. C. S.

Mr. Leon Henderson, Administrator of O. P. A. C. S., at page 57, Part 1, of the hearings before the Committee on Banking and Currency, on the Price Control Bill, H. R. 5479, not only conceded the absence of statutory authority to fix prices, but largely based his recommendation of the enactment of the Emergency Price Control Act on the need for a definite expression of legislative purpose to regulate prices. At page 96 of the hearings, Mr. Henderson said:

"Pretty generally it has been recognized that price control needs a definite statutory basis."

It was not until the enactment of the Emergency Price Control Act on January 30, 1942 that the Office of Price Administration had statutory authority to fix prices on commodities. All of the events important in this case occurred prior to the enactment of this statute.

b. There Was No Constitutional Authority For Price Control on August 2, 1941

It is apparent that price schedules issued by O. P. A. C. S., including Price Schedule No. 14, which fixed the ceiling price on raw silk, issued prior to the effective date of the Emergency Price Control Act of January 30, 1942 (C26, 56 Stat. 28) were valid only to the extent that the Executive had the power, if any, to make them valid.

In the absence of statutory authority, no valid constitutional authority existed in the President to fix prices. As Judge Whitaker correctly states in his dissenting opinion:

"The only body in this country with authority to fix prices is the Congress of the United States. It derives that power from section 1 of Article I of the Constitution which vests in the Congress 'all legislative powers herein granted,' and from section 8 of Article I, providing that 'The Congress shall have power . . . to provide for the common defense and general welfare of the United States . . . to declare war . . . to raise and support armies . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . .'

"No articles of the Constitution could possibly be construed to give the President or any department of the executive branch of the Government authority to

fix prices without congressional authorization. The President's power is executive. He is charged with the duty to 'take care that the laws be faithfully executed,' and he is Commander in Chief of the Army and Navy, but, except for his power to recommend measures, and his authority to participate in the making of treaties, and for his power of veto, he has no legislative power." R. 107).

Without congressional authorization, the Executive, under the Constitution, has no authority to fix prices. The principle asserted by Judge Whitaker has long been recognized by the Courts. The primary determination of policy goals is the function of the legislature in democratic representative governments. Price fixing is a legislative function. *Terminal Railroad Association of St. Louis* v. *United States,* 266 U. S. 17, 30, 69 L. ed. 150, 156, 45 S. Ct. 5; *Prentis* v. *Atlantic Coast Line Ry. Co.,* 211 U. S. 210, 226, 53 L. ed. 150, 158. The power to fix prices is neither expressly nor impliedly included in any war power of the President. *O'Neal* v. *United States,* 140 F.(2d) 908, 911, certiorari denied 322 U. S. 729. As stated by Mr. Justice Hughes in *Home Building and Loan Association* v. *Blaisdell,* 290 U. S. 398, 425, 78 L. ed. 413, 422, 54 S. Ct. 231:

> "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved."

As long ago as the decision of the Supreme Court in *Ex Parte Milligan,* 4 Wall 2, 18 L. ed. 281, 302, the Court pointed out:

> "But neither can the President in war more than in peace intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President."

Supreme Court precedents, upholding World War I price fixing legislation and the Emergency Price Control Act of 1942, establish that price fixing is an exercise of powers delegated to Congress under the Constitution. There are no judicial precedents for the proposition that, in the absence of congressional authorization, even in the emergency of war, price control is an exercise of any power delegated to the President. As the Supreme Court stated in *Schechter* v. *United States*, 295 U. S. 495, 528, 79 L. ed. 1570, 1579, 55 S. Ct. 837:

> "Extraordinary conditions do not create or enlarge constitutional powers."

It is thus clear that at the time O. P. A. C. S. undertook to fix the ceiling price on silk, which the Court of Claims accepted as the measure of just compensation, there was a complete absence of constitutional authority to fix prices.

c. Price Fixing Without Standards is Invalid

Even when the function of price fixing is exercised by Congress it must establish standards and criteria for the exercise of authority conferred by legislation and provide for hearing on complaint and judicial review to determine the reasonableness of regulations which are issued pursuant to statutory authority. See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241; *Schechter Poultry Corp.* v. *United States, supra*, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837; compare *United States* v. *Cohen Grocery Company*, 255 U. S. 81, 65 L. ed. 516, 41 S. Ct. 298. Where legislation establishes reasonable standards and provides for judicial review, this Court has upheld price fixing statutes. *Highland* v. *Russell Car and Snow Plow Co.*, 279 U. S. 253, 73 L. ed. 688, 49 S. Ct. 314; *Sunshine Anthracite Coal Co.* v. *Atkins*, 310 U. S. 381, 397, 84 L. ed. 1263,

1273, 60 S. Ct. 907; *Yakus* v. *United States*, 321 U. S. 414, 88 L. ed. 834, 64 S. Ct. 660; *Bowles* v. *Willingham*, 321 U. S. 503, 88 L. ed. 892, 64 S. Ct. 641.

Under the Emergency Price Control Act, Congress established standards and criteria for the Administrator's exercise of authority to fix prices and for the determination of maximum prices. It did not give the Administrator unbridled discretion to fix prices whenever and wherever he might like and at whatever levels he wished to select. It provided a means for protest of any order of price fixing and rationing and for judicial review by the Emergency Court of Appeals to determine the reasonableness of a regulation or order issued by the Administrator. All these factors were pointed out by this Court in *Yakus* v. *United States, supra,* and in *Bowles* v. *Willingham, supra,* in upholding the validity of price control under the Act.

Unlike price regulations issued under the Emergency Price Control Act, there was no statutory authority on August 2, 1941, when Price Schedule No. 14 establishing the maximum price on raw silk was issued. There were no standards or criteria, by statutory directives or otherwise, to guide or limit the Price Administrator in determining the price level to be fixed for silk. The Administrator acted solely under the authority conferred by Executive Order No. 8734, which provided no standards for the price fixing action of the Administrator. In the recent decision of this Court, decided June 14, 1948, *Lichter* v. *United States*, 92 L. ed. Adv. Ops. 1260, the constitutional validity of the Renegotiation Act was upheld on the ground that the delegation of power to administrative officials to determine whether there have been "excessive profits" was valid and that the statutory standard was sufficiently definite to support the delegation of power. On the other hand, in the famous *Schechter* case, *supra*, this Court held that the

National Industrial Recovery Act was invalid because of the inadequacy of the statutory standard to satisfy constitutional requirements. *A fortiori*, the failure to provide adequate standards in an Executive Order would vitiate the grant of authority thereunder and subject the purported exercise of such authority to challenge in the courts.

d. Price Fixing Without Provision for Legal Protest or Judicial Review is Invalid

There was no provision for legal protest of the prices fixed or for judicial review of the action of the Administrator on August 2, 1941. The announcement of the Price Administrator on July 26, 1941 that within a few days his office would impose a ceiling price on raw silk at approximately the level that had prevailed in the markets on July 21, 1941, was made without prior consultation or discussion of prices with representatives of the silk industry (Finding 10, R. 52; R. 186). Representatives of the silk industry expressed their dissatisfaction with the price that had been determined and the silk owners individually and in groups vehemently protested the ceiling prices and used every argument at their command to get the Government to modify or rescind the ceiling price order and to get a price increase consistent with market levels generally for the silk industry (Finding 26, R. 71; R. 143, 144, 145). The Government did not heed the protests and refused to make any adjustment in the Price Schedule. The silk owners never had an opportunity to judicially protest the unfairness of the ceiling prices and the Emergency Court which later had jurisdiction to review both methods and prices was not established until January 30, 1942, after all the silk had been physically taken by the Government.

c. Price Fixing For Requisition Purposes Is Invalid

Even under the Emergency Price Control Act, which authorized price control, it was not the intention of Congress that the prices fixed by the Administrator should govern in the requisition of property or in compulsory sales. This is shown by Section 4(d) of the Act which provides that "nothing in this Act shall be construed to require any person to sell any commodity." This Court in *Bowles v. Willingham, supra,* a case involving the validity of the Emergency Price Control Act, was careful to point out that the case before it did not involve a "taking of property" by the Government. Congress made it clear that the purpose of price control under the Act was to prevent inflation and protect price structures against the forces of disorganization and the pressures invoked by war and its attendant activities. The concept of price control is the regulation of prices between dealers and consumers in a market open for commercial transactions, not the fixing of prices on a commodity which is entirely diverted from commercial trading and taken over by the Government for public use. Price orders under the Emergency Price Control Act operated to control prices on commodities for civilian consumption. The silk price order was employed to limit the price to be paid for a commodity for Government consumption.

In the instant case, after the raw silk was frozen on July 26, 1941, the Government, through its agency and contractors, acquired the *entire* supply for its defense purposes at the ceiling price. In the case of other commodities which were frozen and upon which ceiling prices were established, the Government, *along with others,* purchased at the controlled prices. In the case of raw silk, the Government was the sole purchaser. Mr. Paul O'Leary, Price Executive of the Division of the Office of Price Administration and

Supply which was responsible for the determination of the ceiling price on silk, stated that they:

> "felt that the importance of parachutes and powder bags, through Army and Navy purchases, would justify controlling the price of raw silk which would go into them, because the negotiations of contracts for parachutes and powder bags would be based, of course, upon the price the contractors would have to pay for the raw silk, and at that time, we were much more concerned in protecting the defense program than about protecting every item concerned in silk stockings." (R. 190.)

Mr. O'Leary stated that raw silk was a very substantial part of the end product price. When asked whether that fact was not a factor influencing his judgment at the time he made his recommendation of the ceiling price on silk, he replied:

> "We felt, at this time, that the cost of raw silk to manufacture parachutes and powder bags, if it were left unrestrained, would substantially increase the cost of these contracts." (R. 190.)

It is clear from these statements of this Government witness that the ceiling price on silk was fixed below the prevailing market price for the designed purpose of keeping down the cost to the Government of the end products of raw silk, i.e., parachutes and powder bags. In the concurring opinion of three Justices of this Court in *United States* v. *John J. Felin & Co., Inc.*, decided June 14, 1948, 334 U. S. 624, 92 L. ed. 1297, 68 S. Ct. 1238, it is stated:

> "If the Government fixed prices with the predominant purpose of acquiring property affected by its order, a different situation would be presented."

f. Decisions Holding That the Ceiling Price Is the Determinant of Just Compensation Are Distinguishable from the Instant Case

In the decisions which have held that the ceiling price was the determinant of just compensation for property taken by the Government, the prices had been duly promulgated under a statute, there existed a market where other parties bought or sold their products at the controlled prices, or the price was agreed to by the members of an industry who voluntarily sold their products at the fixed price which uniformly prevailed at the time the property was taken. *L. Vogelstein & Co.* v. *United States*, 262 U. S. 337, 67 L. ed. 1012, 43 S. Ct. 564; *Cudahy Bros. Co.* v. *United States*, 155 F. (2d) 905; *Graves et al.* v. *United States*, 62 F. Supp. 231; *Lessner Plumbing & Heating Co., Inc.* v. *United States*, 64 F. Supp. 931; *Louisville Flying Service, Inc.* v. *United States*, 64 F. Supp. 938. In the recent decision of this Court, *United States* v. *John J. Felin & Co., Inc., supra*, holding that the maximum price fixed by the O. P. A. was the proper standard of just compensation for pork products requisitioned by the Government, the Court recognized that there was a commercial market for the pork products at the ceiling price which had been *lawfully* fixed and *constitutionally* established after the passage of the Emergency Price Control Act, and that there was a price regulation on meat products on a national scale with judicial review of those regulations.

There is not a single decision by this Court or of any other Court which holds that price control without statutory authority to fix prices, without any standards for determining prices, without provision for legal protest or judicial review, is a valid exercise of the sovereign power where the Government fixed a price on private property which it acquired for public use at such price.

g. The Passage of the Price Control Act Did Not Ratify the Price Schedules Which Were Previously Issued

The Price Control Act of 1942 was a grant of authority to O. P. A. rather than a limitation of the power already exercised or a declaration of existing law. This is clear from the decision of the Emergency Court of Appeals in *Galban Lobo Co. S.A.* v. *Henderson*, 132 F.(2d) 153, certiorari denied, 317 U. S. 690, where the Court ruled that protest and review provisions of the Emergency Price Control Act did not apply to transactions occurring before the effective date of the Act and under price schedules issued pursuant to Executive Order. The Court said at page 157:

> "It is not to be presumed that old transactions are to be reviewed under the provisions of new law. If Congress had wanted such unusual action, it would have said so in no uncertain terms. Instead, there is no word in the legislative history—in the committee reports or in the debates—that suggests any desire for any such retroactive application."

There is no room for suggestion of ratification of Price Schedule No. 14 by implication. The statute specifically provided for reissuance as a prerequisite to validity and there was no reissuance, but in fact a revocation of Price Schedule No. 14 by order of February 18, 1942 for the express reason that the Government had completed its acquisition of all silk in the country. This action is tantamount to an admission that O.P.A. doubted the validity of its original issuance of Price Schedule No. 14 and having already taken all of the raw silk, desired to eliminate any possibility of Court review of its summary action.

2. THE COURT FAILED TO MAKE AN INDEPENDENT JUDICIAL DETERMINATION OF FAIR VALUE OF PETITIONERS' SILK AND ACCEPTED THE CEILING PRICE FIXED BY AN ADMINISTRATIVE AGENCY AS THE MEASURE OF JUST COMPENSATION

No administrative, legislative or other agency of the Government can limit the amount of just compensation or fix the terms upon which it can be ascertained. The determination of just compensation is strictly a judicial function. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327, 37 L. ed. 463, 468, 13 S. Ct. 622; *Seaboard Airline R. Co.* v. *United States*, 261 U. S. 299, 67 L. ed. 664, 43 S. Ct. 354; *United States* v. *New River Collieries*, 262 U. S. 341, 67 L. ed. 1014, 43 S. Ct. 565; *National City Bank* v. *United States*, 275 Fed. 855, affirmed in 281 Fed. 754, writ of error dismissed 263 U. S. 726.

In *United States* v. *New River Collieries Co., supra*, the Court said:

> "The ascertainment of compensation is a judicial function and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard."

In *Monongahela Navigation Co.* v. *United States, supra*, this Court, in holding that the determination of the measure of just compensation is a judicial and not a legislative question stated:

> "The legislature may determine what property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even shall be the rule of compensation. The Consti-

> tution has declared that just compensation shall be paid and the ascertainment of that is a judicial inquiry."

The Court in *National City Bank* v. *United States, supra,* a suit brought under the Lever Act, stated:

> "The executive offices of the Government have no power to fix compensation, nor can Congress determine by statute what is just compensation. The question is judicial and can be determined only by the Courts . . . The Government, as a war measure under the exercise of governmental power, may fix prices, either directly or by governmental regulations necessarily reducing prices; but this does not authorize it to acquire property in invitum at such reduced prices . . .
>
> "To carry out the purposes of the Act, the President could make regulations in the way, inter alia, of fixing prices in the ordinary or commercial transactions; but when the United States itself took foods,—i.e., property,—it was bound to award compensation, and what is just compensation is determined by the same legal principles in war as in peace."

In *Gulf Refining Co.* v. *United States,* 58 C. Cls. 559, 576, the Court stated:

> "But where a board created by law and authorized to take over property fixes a certain valuation it must be recognized that the fixing of the valuation is not conclusive upon the court."

Petitioners are entitled to an independent determination of the amount which would constitute just compensation. What constitutes "payment of just compensation" is a constitutional fact in the sense that without the existence of such fact, the taking is unconstitutional. Such fact must be established through an independent judicial determination. *Crowell* v. *Benson,* 285 U. S. 22, 76 L. Ed. 598, 52

S. Ct. 285. This holds true even upon review of orders of administrative bodies "appointed by law and informed by experience", whose findings, arrived at upon full notice and hearing, are ordinarily taken as final and conclusive.

It follows, therefore, that no administrative finding as to the value of the property can be conclusive in the determination of just compensation, no matter how valid that finding and how supported by *bona fide* proceedings in which the owner had full opportunity to be heard. It follows, *a fortiori*, that if the administrative finding was arrived at without a full hearing, and without statutory authority, it certainly should play no part in the judicial determination of just compensation.

This, in effect, was the holding of the Court in *Walker* v. *United States*, 105 C. Cls. 353, when it said (p. 579):

> "The determination of just compensation under the Fifth Amendment is exclusively a judicial function. This is now undisputed and requires no citation of authority."

However, mere statement of this principle is insufficient when coupled with action which denies its validity.

The Court of Claims failed to make an independent judicial determination as to the value of petitioners' property at the time of the taking and relied on the determination of the Office of Price Administration which had established the ceiling price on raw silk. The Court in its opinion states:

> "Whether authorized or not, the process by which the Office of Price Administration arrived at that price seems to us to have been fair and reasonable." (R. 104-5).

That this was the basis of the Court's decision is brought out by the dissenting opinion which repudiates the figure of $3.08 as just compensation. Judge Whitaker said:

> "I do not think under the facts in these cases the ceiling price of $3.08 fixed by the Office of Price Administration and Civilian Supply had any legal effect in the determination of just compensation . . . (R. 106).
>
> "In my opinion, the fixing of this price on August 2, 1941, was without authority and of no legal effect. If so, it is to be disregarded, except for such evidentiary value as it may have." (R. 107.)

In fact, the scope of administrative finality attributed by the Court to the O. P. A. determination is among the broadest to be found in cases of judicial review of *competent* administrative findings.

Compare, for example, *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586, 86 L. Ed. 1037, 1050, 62 S. Ct. 736, where the Court said:

> "Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."

That was said with respect to a determination made in an adversary proceeding under specific statutory authority in which there was full opportunity to present all evidence, to examine and cross-examine witnesses, and the order was supported by findings which in turn were supported by the evidence. The entire record of the proceeding was before the Court, and upon examination of the record the Court could arrive at the conclusion quoted. In the instant case the determination of O. P. A. C. S. was reached without notice and hearing, without specific findings, and there was no record before the Court nor any other evidence upon which it could reach the conclusion that "the process by which the Office of Price Administration arrived at that

price seems to us to have been fair and reasonable." (R. 105.) On the contrary, the evidence was conclusive that the price selection was purely expedient and arbitrary. The $3.08 per pound price had none of the indicia of a formal determination of fair value set by judicial method.

Ceiling prices set by the Office of Price Administration were not set as just compensation since that office had no authority, even after the passage of the Emergency Price Control Act, to determine just compensation for anyone. Statutes empowering executive agents of the Government to fix prices did not authorize the final determination as to what anyone must accept for property wanted by the Government. *United States* v. *McFarland*, 15 F. (2d) 823.

The principle that the determination of the amount of compensation which an owner shall receive for his property taken from him by the Government for public use is a judicial function is so well established that it seems shocking that a determination of just compensation for petitioners' raw silk, taken exclusively by the Government, should be based on a ceiling price fixed by an agency of the Government without any statutory or constitutional authority. Congress, the Executive or Government agencies have no power to fix just compensation or the rules by which it shall be measured. Certainly, prior to the Emergency Price Control Act of January 30, 1942 and before Congress had delegated any authority to fix maximum prices on commodities, no action by any executive agency fixing a price for a Government taking can in any way affect the determination by a court of the valuation of the property at the time of the taking.

3. The Ceiling Price of $3.08 Did Not Represent the Fair Value of Petitioners' Raw Silk at the Time of the Taking.

a. The Decision of the Court of Claims that $3.08 Was the Fair Value of Petitioners' Raw Silk Was Not Supported by Substantial Evidence and Was Not Sustained by the Findings of Evidentiary or Primary Facts.

The fundamental error of the Court of Claims is the finding of ultimate fact that $3.08 per pound is the just compensation for the raw silk of petitioners. This finding was made by the Court with no substantial evidence in support thereof. Congress has authorized this Court to review decisions of the Court of Claims when there is error of law, where there is a lack of substantial evidence to sustain a finding of fact, when the ultimate finding is not sustained by the findings of evidentiary or primary facts or where there is a failure to make any finding of fact on a material issue. (Act of May 22, 1939, 53 Stat. 752c140, 28 U. S. C. A. Sec. 288.) The findings of the Court of Claims must be based upon substantial evidence and the ultimate findings must be sustained by the findings of evidentiary or primary facts. Absence of proof having probative value with respect to any essential fact, whether primary or ultimate, is expressly made a ground for reversal of the Court's judgments on review by the Supreme Court.

The price of $3.08 per pound has no support in evidence as the market value of silk taken, either on July 26, 1941 or on October 16, 1941.

The Court of Claims in its opinion and finding that $3.08, the ceiling price hastily fixed by the administrative agency, was not less than the fair value of the petitioners' silk, expressly stated that it considered three things: (1) the

nature of the events which caused the rise in the price of silk in the few days preceding the closing of the market; (2) the normal prices of silk between September 1, 1930 and June 30, 1941; and (3) the cost of some of the silk to the owners (R. 105). Examination of these considerations clearly reveals that the finding is not based upon evidence relating to market value. They do not, and cannot, yield a figure of $3.08 as just compensation for the property taken.

(1) The Court does not indicate the basis of its conclusion that, because of an unusually rapid rise in the price of silk in the few days preceding the closing of the market by the Government, the fair value at the time of the taking was represented by prices which obtained before, rather than after, the rise of prices. It must be assumed that if there had been a logical sequence between the nature of the events and $3.08 as the measure of just compensation, the Court would have set it forth in its opinion.

The Court states: "The rise from $3.08 on July 21 to $3.57 on July 25 was an extraordinary fluctuation, and is not a measure of the fair value of the silk as of the later time it was taken." (R. 105.) Yet, neither the special findings nor the evidence bear out that there was either a fluctuation or that it was extraordinary. If regard is had to the facts set forth in Finding 5, we can readily see that there was no fluctuation but a steady rise between July 21 and July 25, except that for July 23 and 24, the closing prices were substantially the same.

According to the testimony of Paolino Gerli, who was an important dealer in, and importer of, raw silk, there was no knowledge of any extraordinary condition between July 21 and July 25 which would indicate a possible termination of the silk market, and silk was bought and sold as usual up to the closing of the Commodity Exchange on July 25, 1941

(R. 119). Mr. Gerli attributed the rise in price of silk after July 1, 1941, to "the demand from the trade, the rising trend in the commodity markets, perhaps some fear on the part of some that there would be some troubles, or that deliveries themselves might be delayed." (R. 129.) Mr. Gerli, when asked what caused the rise in prices during the week of July 21, 1941 replied, "the insistence of buyers to want to purchase, and the reticence of sellers to put out large quantities." (R. 130.) Julius B. Baer, counsel for the Commodity Exchange, testified that for a year prior to the suspension of trading in silk on July 25, 1941, the silk market had been normal; that at no time were the price fluctuations beyond twenty-five cents over the previous day, the limitation placed by the Rules of the Commodity Exchange, which was the determining factor in appraising whether the market was normal or abnormal (R. 150).

Alexis B. Tatistcheff, chief statistician of the Commodity Exchange, testified that price fluctuations during the week of July 21 to July 25, 1941, were not unusual; that the market, as reflected during that week, was not unusually or extraordinarily speculative or inflationary as compared to the markets during the war period (R. 133-4); that there can be unusual periods without unusual fluctuations (R. 134); that even for the peace-time period, there can be conditions in the market which might, purely from the supply and demand standpoint, lead to fluctuations, and that a spread of 25, 30 to 40 cents over a week would ordinarily be found (R. 136, 137); that the price of silk, normally a speculative material, had not advanced as much as had the price of certain other raw materials (R. 137); and that in relation to other commodities, such as hides and cotton, silk had fluctuated less (R. 140).

(2) The Court of Claims' second consideration was limited to the prices between September 1, 1930 and June 30,

1941 which it calls "the normal prices of silk." These prices are set out in Finding 5 (R. 45). During these years, the prices exceeded $3.08 in four months, and were less than $2.00 in 67 months. Indeed, in September, 1930, the price was $1.15. But the prices, though extending for a period of ten years, were not "normal" prices. They were prices obtaining during a period of unprecedented economic depression, of which the Court can take judicial notice,[1] interrupted by slight recoveries, war time interference with foreign trade, and periods of recession, all affecting the demand for silk, a luxury commodity. If, to counterbalance such periods, the preceding ten years are also taken into consideration, it becomes clear that between January, 1920 and June, 1941 the prices ranged between $15.83 per pound and $1.15 per pound, with 131 months above the $3.08 figure, 113 months below said figure, and 67 months below $2.00. If the preceding 20 years are also taken into account, it appears that between July, 1900 and December, 1919 the prices ranged between $13.13 per pound and $2.83 per pound, with only four months below the figure of $3.08.

Obviously, no amount of consideration of the tables in Finding 5 will yield such a figure as $3.08 as the fair value of the property at the time of the taking, whether it be July 26 or October 16, 1941, and neither the Court nor O.P.A.C.S. indicated any use of the tables in the determination of that particular price. By its own statement, O.P.A.C.S. selected a price current on one arbitrarily determined day. If there is any significance in these prices, it must be noticed that while the average of the monthly prices in the period of depression was $2.022, the same average for the equal period of normal times and depression was $4.157, and the

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[1] See *A. T. & Santa Fe R. R.* v. *United States*, 284 U. S. 248, 260, 76 L. ed. 273, 280, 52 S. Ct. 146.

average of the monthly prices for the period covered by the entire table was $4.248.[2]

It is submitted that the historical movement of silk prices preceding the time of the taking has no bearing on the determination of just compensation. The market value of silk as it actually existed is the yardstick to be used irrespective of former prices.

(3) The Court of Claims' third recited consideration was the cost of the silk sued for to the owners, as shown in Finding 7 (R. 49) which showed that only 280 bales of these nine holders' silk, or less than 4 per cent of it, had been bought during the last week of the free market, *i.e.*, between July 21 and July 25, 1941, when the price went above $3.08. In as much as 15 to 20 per cent of all of the raw silk in the country was traded during the period of five days prior to the closing of the market at the prices then prevailing (Finding 7, R. 49), the cost of 250 bales could have no important effect as evidence of market value. Cost is never the criterion for determining just compensation for property taken by the Government. "It is the property and not the cost of it that is protected by the Fifth Amendment." *Brooks-Scanlon Corp.* v. *United States, supra,* 265 U. S. 106, 123, 68 L. Ed. 934, 941, 44 S. Ct. 471. The cost of the silk to the owner has no bearing on the compensation he is entitled to at the time of the taking, whether it be July 26 or October 16, 1941. The Commissioner excluded evidence of cost as a measure of compensation and the Court of Claims did not reverse his action.

This Court has never held that the value of property at the time of the taking can be based on any of the considerations given by the Court of Claims, *i.e.*, active demand un-

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[2] The average between January, 1920 and September, 1930 was $6.322, and for the period of July, 1900 through December, 1919 the average was $4.359.

related to the taking in the market previous to the taking, average prices of the property over a period of years prior to the taking, or the cost of the property to the owner.

b. On July 26, 1941 the Fair Value of Raw Silk Was Not Less Than $3.57 Per Pound

The courts have uniformly construed the just compensation clause of the Fifth Amendment as requiring compensation equivalent to the value of the property at the time of the taking. *Brooks-Scanlon Corp.* v. *United States, supra,* 265 U. S. 106, 123, 68 L. Ed. 934, 941, 44 S. Ct. 471.

The most reasonable and satisfactory standard which the courts have devised for determining just compensation of commodities readily bought and sold is the market value of the property at the time of the taking. *Albrecht* v. *United States,* 329 U. S. 599, 91 L. Ed. 532, 67 S. Ct. 606; *United States* v. *Petty Motor Co.,* 327 U. S. 372, 377, 90 L. Ed. 729, 734, 66 S. Ct. 596; *United States* v. *General Motors Corp.,* 323 U. S. 373, 379, 89 L. Ed. 311, 319, 65 S. Ct. 357; *Olson* v. *United States,* 292 U. S. 246, 255, 78 L. Ed. 1236, 1244, 54 S. Ct. 704.

Where there is a market prevailing at the time and place of the taking, even though the market is affected by unusual or abnormal conditions, the market price is the proper measure of just compensation, provided the market is free. In *United States* v. *New River Collieries, supra,* 262 U. S. 341, 345, this Court, speaking through Mr. Justice Butler, states:

> "If it be an article commonly traded in on a market, and it is shown that, at the time and place it was taken, there was a market on which like articles in volume were openly bought and sold, the prices current in such a market will be regarded as its fair market value and likewise the measure of just compensation for its requisition. . . . The owner was entitled to what it lost by

the taking. That loss is measured by the money equivalent of the coal requisitioned. . . . Transactions were numerous and large quantities of coal were sold. Export prices for spot coal were controlled by supply and demand. . . . The owner had a right to sell in that market, and it is clear that it could have obtained the prices there prevailing for export coal. It was entitled to these prices."

In *C. G. Blake* v. *United States,* 275 Fed. 861, affirmed 279 Fed. 71, the Court says:

"Scarcity of supply and increased demand, resulting from war and labor conditions, cannot be said to constitute artificial enhancement. . . . There is a distinction between a market controlled by unlawful combination and manipulation, and one that is high and irregular due to disturbed conditions at home and abroad. . . . The latter is the result of circumstances not within the control of either purchasers or sellers. . . . The term 'fair market value' does not mean value in a fair market, in the sense of a market in which the supply about equals the demand, but means fair worth in view of existing conditions. . . . How can there be a full and just equivalent, unless the plaintiff receives from the Government as much as it might have received from others in the open market for his coal? . . . The price of $5.60 per gross ton does not exceed its fair value, in contemplation of the available market and the prevailing market prices at the time the Government requisitioned it, and therefore the obligation of the Government to pay just compensation requires the judgment be awarded the plaintiff in that sum."

In *National City Bank* v. *United States, supra,* 275 Fed. 855, approved 281 Fed. 754, writ of error dismissed 263 U. S. 726, it was held that the prices, as a matter of law, to which plaintiffs were entitled for coffee requisitioned by the Navy Department, must be ascertained as of a free market

rather than prices fixed by governmental regulations and that the government was required to pay the price for the coffee which the plaintiffs could have obtained in the free market.

There was a free market in which raw silk for current delivery was traded in the usual course of business on July 25, 1941 (R. 119). The prices current in that market were $3.65 on the Commodity Exchange and $3.57 on the spot market (Finding 5, R. 45), a difference in the grading method accounting for the difference in price. The silk owners had a right to sell in that market and could have obtained the prices there prevailing for their silk. The Government which had been secretly negotiating for large quantities of silk did not wish to pay market prices. When it became evident that because of the rise in the market prices of silk during the week of July 21 to July 25, 1941, the 50,000 bales which the Defense Supplies Corporation had offered to buy at the prices set out in the secret contract would cost more than $3.08, the agreement to purchase was rescinded on July 24, 1941 (Finding 23, R. 69). Two days later, the *entire* supply of raw silk was subjected to Government control, and commercial transactions were terminated. Under the guise of a war measure, although no war existed, in the exercise of Executive powers the Government fixed the price on raw silk at approximately fifty cents per pound below the level prevailing in the market and thereafter acquired all the raw silk for its own use at such reduced price.

The closing of the Commodity Exchange and the suspension of trading in raw silk on July 26, 1941 was due exclusively to governmental action (R. 149). At that time, there were a number of silk contracts for future delivery outstanding. Since the order of the Government precluded any delivery or private use of silk, the Board of Governors of the Exchange appointed a Committee to hold hearings

to determine the price at which these contracts should be liquidated. At the hearings those who were short urged that the price for settlement should be the $3.08 ceiling price, and those who were long urged that the closing price of $3.65 should be used. The Board of Governors directed the settlements to be on the basis of the closing market price on July 25, 1941 (R. 151-153). This ruling of the Board of Governors was upheld by the Circuit Court of Appeals, Second Circuit, in *Crowley* v. *Commodity Exchange,* 141 F. (2d) 182. The closing prices ranging from $3.55 to $3.65 a pound, varying with the delivery month, were found by the Court to represent the fair market values on July 25, 1941. Individuals had to liquidate their contracts at the closing prices whereas the Government was able to acquire silk at the ceiling price.

The petitioners, maintaining that the taking occurred on July 26, 1941, claim that just compensation cannot be less than $3.57, the last actual sale on the spot market on July 25, 1941, which figure was the fair value of the silk commensurate with the demand therefor, as reflected in the free market so close to the time of the taking as to be regarded as contemporaneous therewith. Since spot market sales were made under Japanese gradings normally one full grade inferior to the United States grading used on the Commodity Exchange, the equivalent price for United States grading as paid for on delivery to the Government is on an average equal to the difference in quotation or $3.65 for standard silk. In using the arbitrary ceiling price for United States grades rather than actual market conditions, this question did not affect the Court of Claims.

c. On October 16, 1941 the Fair Value of Raw Silk Was Not Less Than $3.57 Per Pound

The Court of Claims held that the taking of petitioners' raw silk occurred on October 16, 1941, the date on which

the Government, by the amendment to General Preference Order M-22, *required* delivery of the silk. After July 26, 1941, transactions in raw silk for delivery to the Government or its contractors for defense purposes were not in a free market but rather in a controlled market, with but one customer, in which the ceiling price had been fixed at $3.08 per pound, the price the owners were forced to take. This was not just compensation within the meaning of the decisions of this Court. Where there is no market in which the commodity is freely bought and sold in ordinary trade the market value for purposes of just compensation is determined by the Court on the assumption that there is such a market and its ascertainment as just compensation of "the sum that in all probability would result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy." *Brooks-Scanlon Corp.* v. *United States, supra,* 265 U. S. 106, 124, 68 L. Ed. 934, 941, 44 S. Ct. 471; *Olson* v. *United States, supra,* 292 U. S. 246, 257, 78 L. Ed. 1236, 1245, 54 S. Ct. 704.

The fact that the silk owners were after July 26, 1941 forbidden to sell and deliver their silk except to the Government or its agents in accordance with Government regulations has no bearing on the value of their property when taken. The ceiling price of $3.08 was not the result of trading by willing sellers and willing buyers in a free market. In fixing just compensation for the silk taken by the Government it was not relevant that the silk owners could not sell except at the ceiling price, but the Court was required to regard the situation as if the property were being voluntarily sold by a seller free to do so. *Westchester County Park Commission* v. *United States,* 143 F. (2d) 688, 692.

Under the finding of the Court of Claims that there had been a taking of petitioners' property on October 16, 1941, the Court should have determined just compensation on the basis of what the petitioners could have sold their silk for

on October 16, 1941 under fair market conditions. The Court had facts at hand to determine judicially the fair value of the silk on the assumption that there was an actual market on October 16, 1941.

The record shows that the market price would have continued to rise above the closing prices on July 25, 1941. The Court found that after July 25, 1941 the prices of commodities generally continued upward and without the controls thereafter imposed the price of raw silk would also have increased (Finding 7, R. 49). Paul O'Leary, the Government witness, Price Executive of O. P. A. C. S., stated that in the light of subsequent events, with the supply of silk cut off because of restrictions on exchange imposed by the President, that the price of silk in a free market would have gone much higher than the closing market price of $3.57. The fact that the Government intended to purchase silk for parachutes and powder bags would have further increased the price to the Government and that is what the O. P. A. C. S. officials wished to prevent (R. 190).

No restrictions were placed on thrown silk which is crude thread processed from raw silk. The normal difference between the price of raw silk and thrown silk was $1.00 per pound. After July 25, 1941 the price of thrown silk increased substantially. In August, 1941 it sold for $5.50 per pound and for $15.00 per pound in February, 1942. (Finding 24, R. 70; R. 127). In the absence of evidence to the contrary, it can be assumed that the rise in the price of thrown silk was uniform between August, 1941 and February, 1942. On this assumption, taking the normal difference of $1.00 a pound between the price of raw and thrown silk, the value of raw silk in August in an unrestricted market would have been $4.50 and much higher as of October 16, 1941. In any event, based on the price of thrown silk the measure of just compensation could not be less than $4.50 on October 16, 1941.

From the time of the closing of the market there was a continually growing demand for raw silk. The first free sale of silk after the price ceiling had been lifted on February 18, 1942 was in February, 1946 when the War Assets Corporation resold 3,308 bales of surplus silk at auction at an average price of $11.75 per pound (Finding 21, R. 69). This was the same silk which the Government had acquired at the ceiling price. Paolino Gerli testified that he bought back from the War Assets Corporation at $9.51 a pound the identical silk that the Government had taken from him at $3.10 a pound (R. 125).

There was also evidence in the record that subsequent to July 25, 1941 there was a foreign market for raw silk. Between July, 1941 and March, 1942 Brazilian silk was offered to the United States Government at $5.50 per pound. The British Government bought China silk at $8.00 per pound (R. 126-7).

The Court of Claims in its opinion and in its determination of fair value of petitioners' silk entirely disregarded the evidence and its own findings that the price of silk would have increased if controls had not been placed on it by the Government; that thrown silk, which was actually processed raw silk, sold for $5.50 in August and continued to increase in price; that the first free sale of the silk, which the Government had acquired in a controlled market at the ceiling price, was made by the War Assets Corporation at an average price of $11.75 per pound; and that there was a foreign market for raw silk in which the price was much higher than the closing prices of silk in the domestic market on July 25, 1941. Such evidence was substantial and of primary importance in ascertaining just compensation in accordance with the rule laid down by this Court that just compensation is "the sum that in all probability would result from fair negotiations between an owner who is willing to sell

and a purchaser who desires to buy." Such evidence unquestionably would sustain a finding that the fair value of petitioners' property on October 16, 1941 could not have been less than $3.57 for which silk was selling the last day of a free market. Under no circumstances does it support a finding that petitioners were justly compensated by the payment of the $3.08 ceiling price for the property taken.

d. The Ceiling Price of $3.08 Did Not Establish a Market and Did Not Reduce the Amount of Just Compensation to Which Petitioners Are Entitled for the Taking of Their Property

Although the Government destroyed the market for raw silk in the usual sense it did not destroy the market value of the silk. The silk taken by the Government was valuable and its use was valuable. The silk was suitable for the uses of the Government and could have been used by petitioners. The demand for raw silk was great and the supply was limited. Its competitive fibers, also purchased by the Government, became more expensive because of the nonexistence of silk in the general market. There was therefore a market value at the time the silk was taken even though the market was affected by governmental restriction and regulations which had been imposed in a national emergency. As the Court said in *Hudson Navigation Co.* v. *United States,* 57 C. Cls. 411, 416:

> "It is true that the market was affected by the war; war always affects market conditions, either enhancing prices or lowering them, but the fact that war has such effects does not affect the principles which must govern the courts in ascertaining values."

The primary question presented to this Court is whether the ceiling price of $3.08, which was approximately fifty cents below the market price for raw silk at the time it

was fixed, was the market value of petitioners' property at the time it was taken and constituted the controlling measure of just compensation under the Fifth Amendment.

The decisions which have held that Government fixed prices were the measure of just compensation for property taken for public use present a different situation from that in the instant case. In those cases a valid general market regulation existed which established a general price. The Government then does not have any lesser right to take the property at that price than others. Without price fixing, the Government may avail itself of an existing market price and the value of property does not increase merely because the Government wants it. This element of fact, a general market which represents value, is entirely lacking in the case at bar and this is the crucial point of distinction between the instant case and such cases as *United States* v. *John J. Felin Co., Inc.*, decided June 14, 1948, *supra*, 334 U. S. 624, 92 L. ed. 1297, 68 S. Ct. 1238, and *Cudahy Bros. Co.* v. *United States*, 155 F. (2d) 905, where a valid ceiling price sustained the right of the United States to take property at the generally existing market price and limited the right of the owner to demand more upon sales to others. In both the cited cases the ceiling price had been established after the enactment of the Emergency Price Control Act which gave statutory authority to fix prices, sales at the ceiling price had been made in commercial trading and the owners themselves had been regularly selling their products at the prevailing O.P.A. prices. In *L. Vogelstein & Co.* v. *United States, supra*, 262 U. S. 337, 67 L. ed. 1012, 43 S. Ct. 564, the price had been fixed in an agreement which had been made between the War Industries Board and representatives of the copper industry and was approved by the President. The price prevailed uniformly in the market and the United States had purchased at that price. In deciding the case this

Court took notice of the company's acquiescence in the market price and of its cooperation in putting and maintaining it in effect.

True, the Court of Claims in its opinion states:

> "The plaintiffs say that the Government may not set a ceiling price below the market price for the purpose of keeping down the amount which an owner shall be paid when his property is subsequently taken for public use. We agree with this contention of the plaintiffs, but, as we have said, the plaintiffs have not proved that the ceiling price of silk was set for that purpose. It was, so far as appears, set for the normal purpose of protecting the public economy against inflation, and of protecting users of silk from being charged unduly high prices. The Government later became a beneficiary of the lower prices maintained by its ceiling, but it did so only in the same way that it benefited by the controlled prices of most other commodities which it, *along with others,* purchased." (Italics supplied) (R. 104).

But the facts assumed in the foregoing statement of the Court are not supported by the findings and are contrary to the evidence. It certainly is not correct that the Government purchased silk at this price "along with others", because the Government was the sole purchaser or acquisitor of raw silk at the ceiling price. In the case of *other* commodities, the Government did make purchases "along with others" at the ceiling prices. Furthermore, the evidence expressly supports the contention that the ceiling price on raw silk was fixed for the purpose of keeping down the cost of contracts for the manufacture of parachutes and powder bags needed for defense purposes (R. 190). There is no evidence in the record that the ceiling price on silk was "set for the normal purpose of protecting the public economy against inflation, and of protecting users of silk from being charged unduly high

prices." No one but the Government or its contractors benefited by the ceiling price of silk.

In several cases the Court of Claims has rejected the Government fixed prices as the measure of just compensation because there was no demonstrated regular market for the products which were requisitioned at the Government prices. *Illinois Pure Aluminum Co.* v. *United States,* 67 F. Supp. 955, certiorari denied 330 U. S. 834; *Kaiser* v. *United States,* 69 F. Supp. 588; *Adler Metal Products Corp.* v. *United States,* 69 F. Supp. 591.

Looking back to the period during 1941 and 1942 when the events with respect to silk occurred, and considering the urgent need of raw silk for defense purposes and the economic and patriotic forces which were at work, it would have been unthinkable and most unpatriotic for the petitioners to have impeded the defense program by refusing to turn over their silk to the Government at the controlled price. Reference is made to the decision of the Court of Claims in *Pantex Pressing Machine, Inc.* v. *United States,* 71 F. Supp. 859, which involved the determination of just compensation for aluminum heads requisitioned by the War Production Board. The Court held that the plaintiff was entitled to demand more than the Government fixed program price notwithstanding the fact that 98 per cent of the holders of aluminum had voluntarily turned over 96 per cent of their holdings at such price. The Court in its opinion at page 862 stated:

> "This action on their part did not establish a market. They were no doubt largely influenced by a patriotic desire to help the Government in the running of the war. Plaintiff is not required under the Constitution to reduce the amount it is entitled to demand for its property by any discount for patriotism, however commendable it would be for it to do."

We likewise say, as the Court did in the *Pantex* case, *supra*, that the transactions which took place between the silk owners and the Government at the ceiling price of $3.08 did not establish a market and did not reduce the amount of just compensation to which petitioners are entitled.

e. Summary

Under all the circumstances the ceiling price of $3.08 fixed by O. P. A. C. S. on August 2, 1941 did not represent the fair value of petitioners' silk whether the taking occurred on July 26, 1941, as contended by petitioners, or on October 16, 1941, as held by the Court of Claims. The fair value of their property at the time of the taking within the constitutional requirement for the payment of just compensation was not less than $3.57 per pound, the market price for which raw silk was sold on the last day on which it was traded in a free market. To be justly compensated for their property, petitioners are entitled to no less than that market price under like grading which they could have obtained except for restrictions imposed by the Government, together with costs of storage and handling and interest as part of just compensation.

B. The Taking of Petitioners' Raw Silk Occurred on July 26, 1941

1. The Decision of the Court of Claims As to the Taking of Petitioners' Raw Silk

The unanimous decision of the Court of Claims was that there was a taking of petitioners' raw silk for public use. However, the Court held that the taking was consummated on October 16, 1941 when the Government by its order of that date, amending General Preference Order M-22, "required the petitioners to sell their silk, upon request, to those who would use it for the Government's purposes, or

to the Government itself, and it forbade the delivery or use of the silk for any other purpose except by the specific license of the Government, which license, so far as appears, was in no case granted." (R. 102).

The Court pointed out that some time before the Order of October 16, 1941 was issued, the Government had made up its mind that all the raw silk in the country was needed for public use. In order to obtain the silk for that use, the Government employed the procedure of granting priority to its own uses and making acceptance of requests to purchase for that use mandatory (R. 102.) The Court found that such action by the Government constituted a taking of property for public use within the constitutional sense requiring the payment of just compensation. In so finding, the Court noted that it was not until October 16, 1941, the day of the issuance of the amendment to General Preference Order M-22, that there was a statute directly authorizing the taking of such property by the normal eminent domain proceeding. The Court in its opinion stated:

> "Until that statute became a familiar working tool to the agencies of the Government which had the responsibility for obtaining for the Government what it needed for public purposes, they used whatever device was at hand. But to say that when the Government forbids an owner of property to make any other use of it, and requires him to sell it, upon request, to the Government, or its designee who will use it for a Government purpose, is not a taking of the property for public use, would be to make the constitutional right contingent upon the form by which the Government chose to acquire the use of the property." (R. 103).

The use of a date after August 2, 1941 as the date of the taking was essential to the finding of the majority of the Court because the O. P. A. C. S. "ceiling price" order, on which they exclusively rested their determination of just

compensation, was not issued until August 2, 1941. Acceptance of petitioners' contention that their property was taken on July 26, 1941 would have required a determination of the constitutionally protected value of silk from market criteria, or not less than $3.57 per pound. The minority of the Court, on the contrary, having found that the constitutionally protected value of the silk was $3.57 a pound on July 26th with a constant trend upward thereafter, were not concerned with the date of taking because the pleadings limited recovery to not less than $3.57 per pound. Thus, the difference between July 26th and October 16th as the date of taking is not only important because of the accumulation of interest and holding costs to the petitioners on the large sums involved, but principally because on July 26th when the petitioners were deprived of the use and disposition of their property as the first step in the Government's plan to obtain possession of all of the silk in the country, there was no "ceiling price" or administrative determination, legal or illegal, which could even be evidence of value.

The Court supported its opinion with respect to October 16th as the date of taking with the following reasons:

(a) An order mandatory in form requiring delivery of silk was issued on that date;

(b) Specific power of requisition was given to the executive branch of the Government, together with mechanics for its implementation on that date;

(c) The Court assumed that until this time silk owners could keep their silk indefinitely since no prior order in express terms required delivery;

(d) The Court ignored economic and social pressure existing from July 26, 1941;

(e) The Court ignored substantial proof of a well recognized and deliberate plan of Government agents to take all

of the silk in the country at lower than market prices, the plan having been conceived before July 26th and started into action by the freeze of that date; and

(f) The Court assumed without analysis that there was no statutory power compulsory in nature, requiring the petitioners' compliance with the freeze and ceiling price orders prior to the requisitioning act of October 16, 1941.

We contend, however, that there was a plan to acquire the silk even before July 26, 1941; that there was power to compel compliance under statutes in existence prior to October 16, 1941; that there were affirmative steps and economic and social pressures which in the constitutional sense constituted a taking before October 16, 1941; and finally, there was an act which affirmatively deprived petitioners of their property on July 26, 1941.

2. On or Before July 26, 1941 the Government Knew That All Available Raw Silk Would Be Needed for Public Use and Planned to Acquire it for That Use.

The Court below in its opinion states:

> "We think that, at *some time before this order was issued*, the Government had made up its mind that all the raw silk in the country was needed for public use, and that it would employ the procedure of granting priority to its own uses and making acceptance of requests to purchase for that use mandatory to obtain the silk for that use." (Italics supplied.) (R. 102.)

The order referred to was issued on October 16, 1941.

It is manifest from the record and from the events prior and subsequent to July 26, 1941 that the Government on that date knew and stated that all of the raw silk in the United States would be needed for defense purposes.

Sometime in 1939 or 1940 Mr. Gerli, a leading member of the silk industry, had made recommendations to govern-

mental agencies that the Government stockpile silk (R. 118, 128). He discussed the matter of stockpiling with the Government early in 1941 and finally reached a secret agreement for the purchase of 50,000 bales of raw silk which was confirmed on July 10, 1941 in a letter signed by Sam H. Husbands, President of Defense Supplies Corporation (R. 112, 130; R. 182). This offer to purchase was superseded by a subsequent one, different principally as to price limitations, which was tendered to Mr. Gerli by Mr. Husbands in a letter dated July 23, 1941. (R. 114, 130.) Before receipt of his acceptance on July 24, 1941, a representative of Defense Supplies Corporation advised Mr. Gerli by telephone that, because of the rise in the market prices of silk which were substantially higher than the levels which the Defense Supplies Corporation had set for the stockpiling they intended to do, it would be useless to continue with the agreement at that time. (Finding 23, R. 69, 70; R. 131). Two days later silk was frozen, use and delivery except to the Government was prohibited, and the intention to fix a "ceiling" price of $3.08 per pound was announced. The secret agreements with Mr. Gerli were never disclosed to the industry until trial of these cases in 1948!

The Office of Production Management had been established by Executive Order No. 8629 on January 7, 1941, and given authority to take necessary steps to assure an adequate supply of raw materials essential to the production of finished products needed for defense, with allocation and priority power. The Office of Price Administration and Civilian Supply had likewise been set up by Executive Order No. 8734 on April 11, 1941, with authority in the price field to work with the Office of Production Management. That it was the intent and purpose that these two offices should coordinate and function together is expressly shown

by the wording of section 2e of Executive Order No. 8734 which provides:

> "Inform the Office of Production Management of the amount, character and relative importance of materials and commodities needed for civilian use; and advise and consult with the Office of Production Management with reference to its procurement, production planning, priority, and other actions the effect of which may be to diminish the supply of materials and commodities available for civilian use."

Under Section 4 of Executive Order No. 8734 a Price Administration Committee was established with the Administrator of the Office of Price Administration and Civilian Supply as Chairman and the Director General and Associate Director General of the Office of Production Management as members of this committee. The record shows that a Joint Committee of officials of both offices existed on July 26, 1941, for the purpose of coordinating policies with respect to various commodities including silk (Finding 10, R. 52). It can be assumed that these two Government departments did coordinate the policy to be followed with respect to acquiring raw silk, which was a vital material in the manufacture of parachutes and powder bags needed for defense purposes. To assume otherwise would be counter to the presumption of regularity which attaches to governmental action (*United States* v. *Chemical Foundation*, 272 U. S. 1, 14, 71 L. Ed. 131, 142, 47 S. Ct. 1) and would not be in accordance with the idea of efficient and coherent action of our Government in times of stress. The record proves such coordination, if not specific collusion, in the silk seizure plan. Both departments knew the material facts with respect to raw silk, both as to its importance in the defense program and the benefits that would accrue to the Government from a market controlled through allocation

and price control mediums. They were informed as to probable stoppage of Japanese supply by Presidential action and were unwilling to pay the price required by constitutional requisition.

Furthermore, the sequence of governmental action supports petitioners' position that on July 26, 1941, the Government intended to acquire all the available supply of raw silk other than by voluntary purchase and proceeded on that date to take the initial action in carrying out its plan. The Price-fixing Division of the Office of Price Administration had been watching the movement of silk prices, but was of the opinion that as long as normal relations prevailed with Japan it could not establish the ceiling price on domestic sales of raw silk without endangering the country's supply of silk (Finding 12, R. 57; R. 187). The offer to purchase 50,000 bales for stockpiling was withdrawn on July 24, 1941, because the market price of silk during the week of July 21, 1941, exceeded the price the Government was then willing to pay. The President informally announced late on July 25, 1941, that on the following day he would issue an order terminating commercial relations with Japan. He did so on July 26th and on the same day the Office of Production Management and the Office of Price Administration and Civilian Supply acted simultaneously. The former issued General Preference Order M-22 prohibiting the use or delivery of any raw silk without the authorization of the Director of Priorities; the latter caused the suspension of trading in silk on the Commodity Exchange and announced that a ceiling price on raw silk would be imposed at approximately the price which prevailed on July 21, 1941 (Findings 9, 10, R. 51, 52, 53). O. P. A. C. S. issued its "ceiling price" order on August 2, 1941.

The record shows that the determination to control prices on silk was made because the price of silk was a substantial part of the price of its end products, parachutes and powder bags, and that the ceiling price at the level of July 21, 1941, approximately fifty cents a pound below the parachutes and powder bags to the Government (R. 190). 1941 (Finding 12, R. 53). On the same day, General Pref-

As stated, the maximum prices on raw silks were formally fixed in Price Schedule No. 14 issued on August 2, 1941 (Finding 12, R. 53). On the same day, Genreal Preference Order M-22 was amended to forbid any processing of raw silk unless specifically authorized by the Director of Priorities (Finding 11, R. 53), and on August 12, 1941, was amended to further restrict deliveries of silk (Finding 13, R. 58). On October 16, 1941, it was again amended to *require* the delivery of all silk on orders having a preference rating of A-10, a governmental rating, including any orders for silk placed by Defense Supplies Corporation (Finding 14, R. 58). Further amendments were made to this Order on October 28, 1941, and on February 10, 1942 (Finding 15, R. 60; Finding 16, R. 61). Price Schedule No. 14 was revoked on February 18, 1942, but only after all raw silk had been acquired by the Government or its contractors and it was not reissued by the O.P.A. under the Emergency Price Control Act of January 30, 1942, "because there was no silk left in the hands of private owners and they were informed that it had all been requisitioned" (R. 191).

From the setup of the two administrative departments which acted with respect to raw silk and the simultaneous and successive orders issued by them, the conclusion is inescapable that the Government had a well defined plan which was put into operation on July 26, 1941, to acquire all of the much needed silk and at a price below its market

value. It is not within the experience of Government that such simultaneous action should take place without a unified purpose or design.

3. THERE WAS POWER OF TAKING PRIOR TO OCTOBER 16, 1941

The Court in its opinion states:

> "Not until October 16, 1941, the day of the issuance of the order here under discussion, was there a statute directly authorizing the taking of such property by the normal eminent domain proceeding" (R. 102-3).

If the Government required statutory authority for taking silk for public use before the passage of the Requisitioning Act of October 16, 1941, referred to by the Court, we submit that there was statutory authority in existence.

The Act of June 3, 1916 (C. 134, Sec. 120, 39 Stat. 213, 214, 50 U. S. C. A. Sec. 80) enacted during World War I had not been repealed. Under this Act the President in time of war or when war is imminent was empowered through the head of any department of the Government to place obligatory orders for required materials which were to have precedence over all other orders and was given power through the head of any department of the Government to take possession of the plants of those who refused to comply with the orders.

Section 9 of the Selective Training and Service Act of September 16, 1940 (54 Stat. 892, 50 U. S. C. A. Sec. 309) gave the President authority through the head of the War Department or Navy Department to place obligatory and preferential orders for necessary supplies and to take immediate possession of the plant of any person refusing to furnish such supplies. Would it not be deviating from the general intendment of these statutes to say that where

there was express power given to take over plants there was no necessity to submit to a taking of the products of the plants?

The Act of October 10, 1940 (C. 836, 54 Stat. 1000, U. S. C. A. Title 50, Sec. 711) empowered the President to requisition for use or operation by the United States military materials ordered, manufactured, procured or possessed for export purposes.

Petitioners were also confronted by the formidable Executive Order No. 8734 of April 11, 1941, which showed every confidence on the part of the Government in its belief in the existence of statutory power and punitive authority.

Moreover, it ought to be added, that it is a recognized principle that the absence of statutory authority is no impediment to a finding that property has been taken by the Government where it is shown that governmental action results in an actual appropriation of property for public use. This principle is enunciated in *United States* v. *Lynah*, 188 U. S. 445, 465, 47 L. Ed. 539, 547, where this Court says:

> "That which the officers did is admitted by the answer to have been done by authority of the government, and although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the government did, acting under its direction, resulted in an appropriation, it is to be treated as the act of the government. *South Carolina* v. *Georgia*, 93 U. S. 4, 13, 23 L. Ed. 782, 784; *Wisconsin* v. *Duluth*, 96 U. S. 379, 24 L. Ed. 668; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 28 L. Ed. 846, 5 Sup. Ct. Rep. 306."

The foregoing quoted statement is of particular interest in the instant case where the action of Government officials resulted ultimately in an appropriation of petitioners' property. Under the principle as enunciated in the *Lynah* case, *supra*, this Court could find that the taking of petitioners'

property was effected on July 26, 1941, even if on that date there was no specific act of Congress directing the appropriation of property needed for defense purposes. The United States has power to take property needed for public use under its sovereign right of eminent domain subject to the constitutional requirement of payment of just compensation.

4. The Urgent Need for Raw Silk and the Pressures Exerted by the Government to Obtain it, Together With Economic and Other Forces Are Pertinent to a Finding That the Taking Occurred on July 26, 1941

It is perhaps difficult at the present time to realize the great and many forces which were at work over seven years ago when the events with respect to raw silk occurred.

At the time silk was frozen on July 26, 1941, the silk owners had large inventories of silk on hand in preparation for normal Christmas manufacture and many of them had heavy financial obligations which had to be met. The high intrinsic value of raw silk had developed a method of financing through deposit in bonded warehouses and the pledge of the warehouse certificates for bank loans. Warehouse, insurance and other charges were piling up. If they had refused to deliver their silk on the Government orders they would have had to borrow long term money and face financial disaster (R. 144, 145, 174, 176). Many of the silk manufacturers had no established position in the market for artificial fiber or with other raw material dealers that would take on their account (R. 174). Attempts to purchase silk in forms other than raw silk were made but the prices were so high that it was impossible to fabricate it so that it could be sold in the finished products (R. 176). With silk frozen, the throwsters and manufacturers who

had used raw silk were at the mercy of the Government which controlled allocation of substitute fibers. Violation of the Government orders would result in a withholding of the special allocation of rayon allowed by the Government to hosiery manufacturers (R. 171). The Government threatened to expose those not complying with its orders to popular indignation and to exert all the powers of the Government to compel compliance. Every method of "jaw bone enforcement" was used to compel delivery prior to October 16, 1941, at the "ceiling" price.

It must be remembered that the need of the Government for raw silk in carrying out the defense program was urgent. Every citizen with a spark of patriotic feeling desired to help rather than impede the war effort. Considering the tenor of the times and the economic and political forces that were at work, the silk owners could not have refused to comply with the orders and regulations for delivery of their silk. To have done so would have been not only impractical, but most unpatriotic. Under all the circumstances, as prudent and patriotic business men, they had no alternative but to give the Government what it wanted and needed.

5. The Priority Order of July 26, 1941 Was In Effect a Taking of Petitioners' Silk and Was Not Merely a Regulatory Order.

After the Government found that it was inexpedient to stockpile silk because of the rise in prices, the first act in the furtherance of the plan to acquire the entire stock of raw silk was the issuance on July 26, 1941 of General Preference Order M-22 by the Office of Production Management. This Order prohibited delivery or processing of raw silk without the specific authorization of the Director of Priorities (Finding 9, R. 51). The purpose of this order

was stated to be "To conserve the Supply and Direct the Distribution of Silk." The Order was purportedly issued pursuant to statutory authority of the Act of June 28, 1940 (54 Stat. 676) as amended by the Act of May 31, 1941 (55 Stat. 236) which provides that the President, whenever he is satisfied that the fulfillment of requirements for the United States will result in a shortage of the supply of any material for defense or for private account, may *allocate* such material upon such conditions and to such extent as he shall deem necessary and appropriate in the public interest and promotion of the national defense and provides for the delegation of powers to administrative agencies.

The purpose of "allocation" within the intendment of the statute was to prevent an unequal distribution of a scarce commodity. The concept of "allocation" is an equitable distribution to meet civilian needs. This was well expressed by the Supreme Court in *L. P. Steuart & Bro.* v. *Bowles,* 322 U. S. 398, 405, 88 L. Ed. 1350, 1354, 64 S. Ct. 1007. There is not a single instance in any reported case where, under the guise of a priority regulation, the Government took control of all of a commodity for the purpose of acquiring it for its own use.

The order of July 26, 1941 was not as it appeared to be upon its face a "freezing" order in anticipation of subsequent allocation of silk partly to civilian use and partly to military requirements. Other priority orders, issued under the authority of the same Executive Order and later statutory authority with respect to materials needed in the prosecution of the war, permitted individual allocations among essential users for civilian consumption. The silk order was not a regulation for the allocation of raw silk within the meaning of that term. There can be no "allocation" of an entirety. Viewing the Order of July 26, 1941, designated as the "priority order", from the standpoint of its actual purpose and effect, it was not a regulatory order

within the intendment of the statute authorizing "allocation" of materials necessary to promote the national defense, but was rather a preemption of all the raw silk in the United States on July 26, 1941 for the fulfillment of military requirements. The "freezing" of the entire supply of a commodity by the Government for its own use is not allocation—it is confiscation.

The courts have recognized the distinction between "allocation" and a "taking." This Court in *William C. Atwater & Company* v. *United States,* 275 U. S. 188, 191, 72 L. Ed. 229, 230, 48 S. Ct. 90, said:

> "*No part of claimant's coal was consumed or appropriated by the Government.* Claimant asserts that its power to dispose of the coal was taken and withheld until it got credit therefor. But, if that be assumed, there is nothing to indicate that *the taking was for public use* . . . Claimant contends that, even if there was no taking, the Government is liable on contract implied. It was not the *Government's purpose to acquire any of claimant's property.* The Fuel Administrator's order was made to expedite the movement of coal by subjecting it to the rules and operations of the exchange . . . " (Italics supplied.)

An order which allocates a commodity among dealers and consumers or diverts it to *others* has been considered to be a regulation. But an order which restricts the use of private property and subjects it to 100 per cent diversion to the Government for the use of the Government is a taking. Such was the effect of the priority order of July 26, 1941. As Mr. Justice Holmes says in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 415, 67 L. Ed. 322, 326, 43 S. Ct. 158:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

No sales of raw silk were made after July 26, 1941 except for uses as prescribed by Government regulations and all transactions were required to be in accordance with the ceiling price set out in Price Schedule No. 14 (Finding 21, R. 69). None of the raw silk was ever permitted to be acquired or consumed by anybody except the United States Government or its contractors (R. 124). The order of July 26, 1941 not only stopped trading in silk but prohibited delivery on outstanding orders (R. 122). Holders of raw silk were compelled to maintain the silk in their own possession and could not consume it and the warehouses could not deliver it (R. 122). There was never any suggestion that the Government did not control the actual custody and delivery of the silk after July 26, 1941 (R. 153). When the Government froze silk it said to every owner, "Until you get the green light from us, you can't do anything with your silk." (R. 154). After July 26, 1941 the owners held their silk for the Government (R. 144). The Government knew that after that date no more silk could be transferred physically to anyone other than to the United States Government or for the use of the Government (R. 188).

As of July 26, 1941 the Government took virtual control of raw silk in toto. The record is replete with evidence that from July 26, 1941 to the time delivery was made to the Defense Supplies Corporation, the petitioners held their property for the Government. At no time after July 26, 1941 did the owners of raw silk have a genuine option or election other than to hold the silk and deliver it at the direction of the Government. At no time after July 26, 1941 did the owners of raw silk exercise any real ownership of that silk and at no time after that date could they have exercised that ownership. The primary purpose of their ownership, to sell their property, was gone because the market was closed. After a short time even assignment of

their interest was prohibited (R. 59). They could not select their buyers because of General Preference Order M-22. They could not fix the price because the Price Administrator announced he would fix the price and did so. Seizure of their plants and warehouses was possible at the Government's option. If they refused to turn over their property, they would impede the war effort and be subjected to public censure. Failure to comply with Government orders for delivery of their silk would have been unthinkable under all the circumstances.

It did not require the amendment of October 16, 1941 to the priority order making acceptance of the orders mandatory, nor did it require the statutory authority under the Requisitioning Act of October 16, 1941 (55 Stat. 742) to effect expropriation of petitioners' property. July 26, 1941 was the date that petitioners' ownership in their property ended for all practical purposes. There remained only the question of date and place of delivery and adequate payment. Governmental action, which deprives the owner of the use and benefit of his property which is needed for public purposes, is a taking within the meaning of the Constitution requiring the payment of just compensation. *United States* v. *Welch*, 217 U. S. 333, 54 L. Ed. 787; *United States* v. *General Motors Corporation*, 323 U. S. 373, 89 L. Ed. 311, 65 S. Ct. 357; *Richards* v. *Washington Terminal Company*, 233 U. S. 546, 58 L. Ed. 1088; *United States* v. *Lynah*, 188 U. S. 445, 47 L. Ed. 539.

Considering the substance and purpose of the order of July 26, 1941, rather than its form, it seems clearly apparent that it was in effect a taking of petitioners' raw silk.

6. *Summary*

For the reasons discussed above, we submit that the time of the taking of petitioners' property was July 26, 1941, the date of the issuance of General Preference Order M-22

and that just compensation for their silk should be determined as of that date.

Conclusion

This case presents to this Court, which is the only remaining forum to which petitioners can look for relief, the cold question of administrative evasion of the constitutional provisions for the protection of property. If by an administratively contrived plan or device of "freezing" and prohibiting the delivery of all of a commodity in time of peace, the Executive branch of the Government may compel the acceptance of a price subsequently established below the prevailing free market value, then the security of property in this country shall have been irremediably impaired.

It was important and serious error requiring correction by this Court for the Court of Claims to allow an administrative fiat, issued without color of statutory or constitutional authority, to usurp the judicial function of determining just compensation in the constitutional sense. It was also error to disregard the realities of the factual situation on July 26, 1941 and find that the taking occurred on October 16, 1941, several months after petitioners had been deprived of all effective control over their property, instead of the earlier date of July 26, 1941.

There are no other comparable instances in the history of World War II. All raw silk was taken for Government use. No market remained. The pretense of regulatory action was deliberate. Coercive efforts by the Executive branch to compel "voluntary" acceptance of confiscatory prices should not be given judicial sanction. Just compensation is exclusively a judicial prerogative.

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Claims should be reversed with direction to enter judgment for petitioners for the difference between the payments received by them based

on the ceiling price of $3.08 per pound for standard silk and just compensation figured at not less than $3.57 per pound, plus reasonable compensation for carrying charges from July 26, 1941 to the respective dates of delivery of their silk and interest as part of just compensation for the period from July 26, 1941 to the date that petitioners shall be paid just compensation for their silk.

Respectfully submitted,

WILLIAM A. ROBERTS,
Attorney for Petitioners.

Of Counsel:
IRENE KENNEDY,
WARREN WOODS,
ROBERTS & MCINNIS,
735 Transportation Building,
Washington 6, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 490

EDWARD P. STAHEL & CO., INC. ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims (R. 97-109) are reported at 78 F. Supp. 800-807.

JURISDICTION

The judgment of the Court of Claims was entered on June 28, 1948 (R. 109). A motion for a new trial was overruled on October 4, 1948 (R. 110). The petition for a writ of certiorari was filed on December 31, 1948. The jurisdiction of this Court presumably is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether, assuming that there was a taking of petitioners' raw silk within the meaning of the Fifth Amendment,[1] the Court of Claims erred in finding that the taking occurred on October 16, 1941, when the Office of Production Management issued amended Order M-22 which, on the basis of the A-10 priority therein given, required acceptance of contracts or orders for raw silk placed by Defense Supplies Corporation, rather than on July 26, 1941, when the same office issued its original Order M-22 prohibiting the delivery of raw silk.

2. Whether upon all the evidence the Court of Claims properly fixed just compensation for the silk at $3.08 a pound rather than at $3.57 a pound, the closing price on July 25, 1941, the last day of trading on the market.

STATUTES AND REGULATIONS INVOLVED

The provisions of the Act of May 31, 1941 (55 Stat. 236) which amended the Act of June 28, 1940 (54 Stat. 676); of General Preference Order M-22 issued by the Office of Production Management 6 Fed. Reg. 3731; and of the amendments thereto 6 Fed. Reg. 3892, 4046, 5290 are set forth in the Appendix, *infra*.

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[1] The Government believes that the Court of Claims erred in holding that there was a "taking" of petitioners' raw silk. That question is being raised in a conditional cross-petition which the Government is filing.

STATEMENT

Petitioners, on August 14, 1945, brought suit against the United States in the Court of Claims seeking to recover just compensation for the alleged taking of their raw silk. The facts as found by the court below may be summarized as follows:

From July 21, 1941 to July 25, 1941, the market price of raw silk was rising rapidly from $3.04 a pound to $3.65 a pound (R. 48). During the preceding eleven years the average monthly price exceeded $3.08 in only four months and was less than $2.00 a pound in 67 months. Of the silk here involved, less than 4% was acquired by the petitioners at the prices prevailing from July 21 to July 25, 1941 (R. 49). Each of the petitioners owned a quantity of raw silk at this time. On July 26, 1941, the President of the United States, having announced his intention of so doing on the preceding afternoon at a press conference, "froze" all Japanese assets in this country by virtue of Executive Order 8832, 3 C.F.R., 1941 Supp., 246 (R. 50). This order terminated all commercial transactions in raw silk with Japanese nationals and thus cut off the source of supply for practically all of the raw silk used in this country (R. 50).

On this same day, the Office of Production Management, acting pursuant to the Act of June 28, 1940 as amended by the Act of May 31, 1941 (Appendix, *infra*, p. 15), issued General Preference Order M-22, which prohibited the delivery or

acceptance of raw silk without the specific authorization of the Director of Priorities. Also on July 26, 1941, the Commodity Exchange, the only market in New York for the purchase and sale of futures contracts in raw silk, suspended such trading in silk at the request of the Administrator of the Office of Price Administration and Civilian Supply, who announced on this same day that his office would within a few days impose a price ceiling on raw silk at approximately the level that had prevailed in the markets on July 21, 1941 (R. 52).

On August 2, 1941, by virtue of Price Schedule No. 14, a price ceiling of $3.08 a pound was set (R. 53-56), and on the same day the Office of Production Management amended General Preference Order M-22 so as to forbid all processing of raw silk unless specifically authorized by the Director of Priorities. On August 12, 1941, this same preference order was amended so as to permit deliveries of raw silk to Defense Supplies Corporation or pursuant to its instructions. Again, on October 16, 1941, the Office of Production Management amended the order (M-22). The pertinent part of that amendment was as follows:

> 963.1 General Preference Order No. M-22 —(a) *Applicability of Priorities Regulation No. 1.*—All of the provisions and definitions of Priorities Regulation No. 1, issued by the Director of Priorities on August 27, 1941, shall be deemed a part of this Order, except in so far as they are inconsistent herewith.

(b) *Required and permitted deliveries.*

(1) The following orders are hereby assigned a preference rating of A-10, and acceptance thereof is required:

(i) Any contract or order for silk cloth, shroud lines, tape or thread for either life, material, or flare parachutes placed by the War Department, the Navy Department, or the Department of Commerce for such parachutes to be delivered to or for the account of the Army, Navy or Weather Bureau of the United States.

(ii) Any contract or order for silk in any form required by the person placing the same to fulfill his contracts or orders on hand, provided such silk is to be physically incorporated in material to be delivered under contracts or orders included under (i) above.

(iii) Any contract or order for raw silk placed by the Defense Supplies Corporation.

* * * * *

By further amendment to M-22 on October 28, 1941, each owner of raw silk was required to make a written report of his raw silk on hand to the Office of Production Management (R. 60).

On September 1, 1941, Defense Supplies Corporation sent to various raw silk holders a form of purchase contract known as "D.S.C. Silk No. 1" with a letter offering to purchase silk at the ceiling price but containing no mention of priority orders (R. 62-65). A new form of contract "D.S.C. Silk

No. 3" was adopted about December 22nd and sent on December 23rd to all known holders of raw silk. This latter form contained a specific reference to Amended Order M-22 of October 16, 1941, and "required" acceptance under the A-10 priority there given (R. 65-68). All the petitioners here accepted orders in December, 1941 or January, 1942, two of them, Edward P. Stahel & Co., Inc., and Oscar Heineman Corporation on the "D.S.C. Silk No. 1" form and the remaining seven on the "D.S.C. Silk No. 3" form (R. 80-94, 101). Petitioners were paid for the silk here involved at $3.08 a pound, the ceiling price for standard grade silk (R. 80-94, 101). On February 10, 1942, the War Production Board under the Act of October 16, 1941 (55 Stat. 742), requisitioned 17,177 bales representing all silk not then belonging to Defense Supplies Corporation, except for 600 bales requisitioned later on March 17, 1942 (R. 69).

The Court of Claims found that petitioners' silk had been taken by the Government on October 16, 1941, the day upon which the Office of Production Management amended its Order M-22 (R. 102). The reasons given were that the order prohibited the owner from making any other use of his silk and at the same time required him to sell it, on request, to the Government. A majority of three judges of that court, after an examination of the materials they had at hand, concluded that $3.08 a pound was "just compensation". (R. 104-105). In arriving at this conclusion, the court said that

there being no market at the time of taking, it had considered the nature of events which caused the extraordinary rise in the price of silk in the few days preceding the closing of the market,[2] the normal prices of silk previously prevailing as shown by tables set out in the findings, and the cost of the silk to the owners (R. 105). Two judges dissented on the ground that $3.57 a pound was "just compensation" because it was the closing price on July 25, 1941, the last day of trading on the market (R. 106).

ARGUMENT

1. Petitioners stress primarily the alleged impropriety of basing an award of just compensation on a ceiling price fixed by the Office of Price Administration and Civilian Supply prior to the enactment of the Emergency Price Control Act of January 30, 1942, 56 Stat. 177, 50 U.S.C. App. 633. But that question, we submit, is not presented by this case. It is clear from the findings and from the opinion that the Court of Claims did not arrive at $3.08 a pound as "just compensation" by using the ceiling price as its basis, but rather arrived at such a figure after an independent judicial determination. The Court of Claims, having noted that petitioners challenged the authority of the Office of Price Administration and Civilian Supply

[2] The market closed on July 26, 1941. The court stated that the prices prevailing from July 21 to July 25 were those of an extraordinary fluctuation and were no measure of the fair value of the silk as of the later time that the silk was taken (R. 105).

to set the ceiling price of $3.08 a pound, goes on to state that it was unnecessary to decide this question, "because we think that the price of $3.08 per pound represented a fair price and just compensation for the silk taken." 78 F. Supp. 800, 805. The court then mentioned its consideration of the prices of silk from 1930 to 1941 and of the "extraordinary fluctuation" of July 21 to July 25, 1941, which it stated was no measure of the fair value of the silk as of October 16, when it was "taken." There then appears, first, the clear expression by the court of an intention to make its own judicial determination followed by the explained determination.[3] Had the court intended to rely on the ceiling price as the basis of just compensation it would not have by-passed the question of whether there was authority to set it, it would not have undertaken to make and to explain a determination

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[3] "* * * There being no market, in the usual sense, for silk at the time of taking, the court must make its decision as to just compensation out of such materials as are at hand. Considering the cost of the silk here sued for, our finding 7 shows that only 280 bales, or less than 4 percent of it, had been bought during the last week of the free market, when the price went above $3.08. Considering then the nature of the events which caused the extraordinary rise in the price of silk in the few days preceding the closing of the market, the normal prices of silk as shown by the tables cited, and the cost of the silk to the owners, we conclude, *as this court did* in *Walker et al. v. United States*, 64 F. Supp. 135, 105 Ct. Cl. 553, and that the $3.08 which the plaintiffs were paid was not less than the fair value of their silk." 78 F. Supp. 800, 805 (Italics supplied).

In the *Walker* case referred to above the court said that in arriving at $3.08 a pound as just compensation it did so in the exercise of its judicial functions independently of any conclusion arrived at by the Price Administrator. 105 Ct. Cls. 553, 580.

of its own and it would not have referred to the *Walker* case as it did. Whatever may be the merits of petitioners' attack on the validity of the ceiling price fixed by the Office of Price Administration and Civilian Supply in the summer of 1941, this case does not present it.

2. The other contentions urged by petitioners are also lacking in merit. Petitioners contend (a) that the court should have found a "taking" on July 26, 1941, on the theory that the freezing order M-22 issued on that day was the first step in a plan by the United States to acquire all outstanding raw silk at a price it would subsequently determine itself and (b) that the figure of $3.08 a pound which the court below fixed as just compensation is inadequate and that the figure of $3.57 per pound should have been adopted. These contentions are wholly factual in nature and in each instance the holding of the Court of Claims is based upon findings of fact supported by substantial evidence.

(a) Petitioners contend that their silk was taken on July 26, 1941 by the issuance of General Preference Order M-22 (Appendix, pp. 16-18) by the Office of Production Management. That order prohibited the delivery or acceptance of delivery of raw silk without the specific authorization of the Director of Priorities of the Office of Production Management. Petitioners contend that the taking occurred at this time because the issuance of this order was the first step in a government "plan" to

acquire raw silk at a price it would subsequently determine itself.

The above order of July 26, 1941 was issued pursuant to the Act of May 31, 1941 (55 Stat. 236) which amended the Act of June 28, 1940 (54 Stat. 676). In the absence of the "plan" alleged by petitioners, it is clear that the issuance of the above "freezing" order did not amount to a taking. Acts done in the proper exercise of governmental powers do not amount to a "taking" simply because injury is suffered, but only if there is an actual taking of the property or a direct invasion of it. *Transportation Co.* v. *Chicago,* 99 U. S. 635, 642; *Gibson* v. *United States,* 166 U. S. 269, 275-276. It follows of course that the same rule applies to acts done in the proper exercise of war powers. *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 156-157; *Atwater & Co.* v. *United States,* 275 U. S. 188, 190-191; *Omnia Co.* v. *United States,* 261 U. S. 502, 508-509.[4] In the instant case, the "freezing" order of July 26, 1941, did not involve either an actual taking or a direct invasion sufficient to constitute a "taking". Cf. *St. Regis Paper Co.* v. *United States,* 76 F. Supp. 831 (Ct. Cls.), certiorari

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[4] There may be of course a "taking" where there is a deprivation of the former owner by destruction of the property, the accretion of a right or an interest to the sovereign in such a case being unnecessary. In the case of a freezing of the possession of property, such as is involved here, the effects are not "so complete as to deprive the owner of all or most of his interest in the subject matter." *United States* v. *General Motors Corp.,* 323 U. S. 373, 378.

denied, October 11, 1948; *Henderson* v. *Bryan,* 46 F. Supp. 682, 685 (S.D.Cal.).

It is equally clear that there was no "plan" such as petitioners allege. Petitioners contend that the plan is shown from the relationship of the two administrative departments (Office of Production Management and the Office of Price Administration and Civilian Supply) which acted with respect to raw silk and the simultaneous and successive orders issued by them. (Pet. 63). There is no evidence of any "well defined" plan and the only pertinent finding fails to show that the two departments had any such "plan".[5] Petitioners say it can be assumed that the two departments coordinated the policy to be followed. We see no basis for such an assumption in the light of testimony given to exactly the opposite effect (R. 217, 221, 222). Certainly the "simultaneous and successive" orders issued by the departments do not prove any such "plan". Contrary to petitioners' contention, not only do the findings and evidence fail to disclose the existence of any such "plan" but the Court of Claims in its opinion stated that, "The plaintiffs have not proved such a preconceived plan." 78

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[5] "* * * A joint committee of OPACS and OPM officials existed at that time for the purpose of coordinating policies with respect to various commodities including silk, but the evidence does not satisfactorily show what discussion, if any, took place between those agencies on or prior to July 26, 1941, with respect to the acquisition of silk" (Finding 10, R. 52-53).

F. Supp. 800, 803.[6] Probably what took place was the tentative step-by-step formulation of policy with respect to silk supplies and prices, in the light of a highly fluid foreign situation. It would be unrealistic to assume that under those conditions the officials responsible for the issuance of General Preference Order M-22 in July had any other purpose at that time than to prevent use of existing silk supplies for non-essential purposes.

(b) The amount of $3.08 a pound found by the lower court to be just compensation is supported by the findings and the evidence. Petitioners first objection is that the findings and evidence do not bear out the existence of an extraordinary market fluctuation from July 21 to July 25, 1941, so as to justify the court's disregard of the prices existing during this period in arriving at a determination of just compensation. A comparison of the prices in Finding 5 (R. 45-47) and a study of these prices in graphic form (Def's. Exhs. 15, 17, cf. R. 255), clearly indicates the extraordinary nature of the July 21 to July 25, 1941, price fluctuation. Petitioners rely heavily on the testimony of one Paolina Gerli as evidencing the lack of any extraordinary fluctuation (Pet. 41-42). The probative value of that testimony is more than offset by Mr.

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[6] There can be no doubt that the two dissenting judges who disagreed as to the amount of compensation, agreed as to the absence of any plan since they concurred with the majority that the date of taking was October 16, 1941. 78 F. Supp. 800, 806.

Gerli's contrary statement in a letter which was written by him to the Defense Supplies Corporation on July 23, 1941, the very mid-point of this period. (R. 226).

Petitioners' next objection is that the Court of Claims should not have considered, in its determination of fair compensation, market prices previous to the time of taking. The court in its opinion clearly indicated the necessity of using such prices because of the lack of a market at the time of taking, October 16, 1941.[7] Petitioners themselves urge consideration of previous prices in contending that fair compensation was the price paid in the market on July 25, 1941. As stated by the court, these prices were so extraordinary as to be no measure of the fair value of petitioners' silk as of the time it was taken. 78 F. Supp. 800, 805. Obviously the court was correct in going further back and studying normal prices.

Petitioners' third objection is that the court in its determination considered the cost of the silk to petitioners.[8] We do not agree that cost can never be a criterion in the determination of just compensation for property "taken" by the Government. In such a situation as this where there was no free

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[7] "There being no market, in the usual sense, for silk at the time of taking, the court must make its decision as to just compensation out of such materials as are at hand." 78 F. Supp. 800, 805.

[8] Finding 7, R. 49, shows that less than 4% of the silk was purchased at prices above $3.08 a pound. The court considered this in its determination. 78 F. Supp. 800, 805.

and open market at the time of taking, and where the materials for ascertaining compensation were scant, we believe that it was proper for the court to consider, along with previous market prices, the cost of silk to petitioners. The rule that cost may not be considered applies only when there is a free and open market prevailing at the time the property is taken. *United States* v. *New River Collieries,* 262 U. S. 341, 344; *United States* v. *Felin and Co.,* 334 U. S. 624, 643, 652.[9]

CONCLUSION

The issues presented by the petition were correctly decided by the Court of Claims, and there exists no conflict. It is therefore respectfully submitted that the petition should be denied.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
PAUL A. SWEENEY,
FRANCIS P. LINENDOLL,
Attorneys.

MARCH 1949.

[9] In the *New River Collieries* case this Court said that the lower court was correct in rejecting cost as an element of consideration because: "it was shown beyond controversy that there were market prices prevailing when and where the coal was taken." 262 U. S. 341, 344.

In the *Felin* case Mr. Justice Reed speaking for three members of this Court in a concurring opinion stated that: "If there is no real market value, cost may be an element in the determination of value." 334 U. S. 624, 643. And Mr. Justice Jackson speaking for two members in the dissenting opinion stated that cost was a proper element for consideration where there was no true market price. 334 U. S. 624, 652.

APPENDIX

1. The Act of May 31, 1941 (55 Stat. 236) which amended the Act of June 28, 1940 (54 Stat. 676) provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 2 of the Act approved June 28, 1940 (Public, Numbered 671, Seventy-sixth Congress), as amended, is amended by inserting "(1)" after "SEC. 2. (a)" and by adding at the end of subsection (a) thereof the following:
>
> "(2) Deliveries of material to which priority may be assigned pursuant to paragraph (1) shall include, in addition to deliveries of material under contracts or orders of the Army or Navy, deliveries of material under—
>
> "(A) contracts or orders for the Government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled 'An Act to promote the defense of the United States';
>
> "(B) contracts or orders which the President shall deem necessary or appropriate to promote the defense of the United States; and
>
> "(C) subcontracts or suborders which the President shall deem necessary or appropriate to the fulfillment of any contract or order as specified in this section.
>
> Deliveries under any contract or order specified in this section may be assigned priority

over deliveries under any other contract or order. Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material for defense or for private account or for export, the President may allocate such material in such manner and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. The President shall be entitled to obtain such information from, require such reports by, and make such inspection of the premises of, any person, firm, or corporation as may be necessary or appropriate, in his discretion, to the enforcement or administration of the provisions of this section. No person, firm, or corporation shall be held liable for damages or penalties for any default under any contract or order which shall result directly or indirectly from his compliance with any rule, regulation, or order issued under this section. The President may exercise any power, authority, or discretion conferred on him by this section, through such department, agency, or officer of the Government as he may direct and in conformity with any rules and regulations which he may prescribe."

2. The following Order was issued by the Office of Production Management on July 26, 1941: (6 F. R. 3731)

General Preference Order M-22 To Conserve the Supply and Direct the Distribution of Silk.

Whereas, the uncertainty of future shipments of Raw Silk from abroad and national defense requirements for Silk have created a shortage thereof and it is necessary, in the public interest and to promote the defense of the United States, to conserve the supply and direct the distribution of Silk;

Now, therefore, it is hereby ordered, That:

§ 963.1 *General preference order*—(a) *Definitions.* For the purposes of this Order:

"Person" means and includes any individual, partnership, association, corporation or other form of enterprise.

(b) *Restrictions on deliveries.* No Person shall hereafter make delivery, and no Person shall accept delivery, of Raw Silk unless specifically authorized by the Director of Priorities: *Provided, however,* That deliveries of imported Raw Silk may be made without restriction to any Person importing the same, either directly or through an agent.

(c) *Restrictions on processing.* No Person shall during the week commencing Monday, July 28, 1941, or during any succeeding week, knit, weave or otherwise process thrown Silk in excess of that knit, woven or otherwise processed by him during the week ending July 26, 1941, unless specifically authorized by the Director of Priorities.

(d) *Appeal.* Any Person who considers that compliance with this Order will work an undue hardship upon him may appeal by tele-

graph or mail to the Director of Priorities, Office of Production Management, Washington, D. C., setting forth the pertinent facts and the reason such Person believes that he is entitled to relief.

* * * * *

E. R. STETTINIUS, JR.

3. The following Amendment to General Preference Order M-22 was issued by the Office of Production Management on August 2, 1941: (6 F. R. 3892)

Amendment to General Preference Order No. M-22 To Conserve the Supply and Direct the Distribution of Silk.

(a) § 963.1 *General Preference Order No. M-22* is hereby amended as follows:

(1) Paragraph (c) of said section is hereby amended to read as follows:

(c) *Restrictions on processing.* (1) No Person shall during the week commencing Monday, July 28, 1941, or during any succeeding week, knit, weave, or otherwise process thrown Silk in excess of that knit, woven, or otherwise processed by him during the week ending July 26, 1941, unless specifically authorized by the Director of Priorities.

(2) No Person shall after twelve o'clock midnight on Saturday, August 2, 1941, throw, spin or otherwise process raw Silk, unless specifically authorized by the Director of Priorities.

* * * * *

E. R. STETTINIUS, JR.

4. The following Amendment to General Preference Order M-22 was issued by the Office of Production Management on August 12, 1941: (6 F. R. 4046)

Amendment to General Preference Order No. M-22 To Conserve the Supply and Direct the Distribution of Silk.

(a) Section 963.1 (General Preference Order No. M-22) is hereby further amended as follows:

(1) Paragraph (b) of said section is hereby amended to read as follows:

(b) *Restrictions on deliveries.* No Person shall hereafter make delivery, and no Person shall accept delivery, of Raw Silk unless specifically authorized by the Director of Priorities: *Provided, however,* That deliveries of imported Raw Silk may be made without restriction to any Person importing the same, either directly or through an agent, *And provided further,* That deliveries of Raw Silk may be made without restriction by or to Defense Supplies Corporation, or pursuant to its instructions.

* * * * *

E. R. STETTINIUS, JR.

5. The following Amendment to General Preference Order M-22 was issued by the Office of Production Management on October 16, 1941 (6 F. R. 5290)

Amendment to General Preference Order No. M-22 to Conserve the Supply and Direct the Distribution of Silk.

Whereas, the uncertainty of future shipments of raw silk from abroad and national defense requirements for silk have created a shortage thereof and it is necessary in the public interest and to promote the defense of the United States to conserve the supply and to allocate the said supply in the manner and to the extent in this Order provided;

Now, therefore, it is hereby ordered, That: General Preference Order No. M-22 is hereby amended to read as follows:

§ 963.1 *General Preference Order No. M-22* —(a) *Applicability of Priorities Regulation No. 1.* All of the provisions and definitions of Priorities Regulation No. 1, issued by the Director of Priorities on August 27, 1941, shall be deemed a part of this Order, except in so far as they are inconsistent herewith.

(b) *Required and permitted deliveries.* (1) The following orders are hereby assigned a preference rating of A-10, and acceptance thereof is required:

(i) Any contract or order for silk cloth, shroud lines, tape or thread for either life, materiel, or flare parachutes placed by the War Department, the Navy Department, or the Department of Commerce for such parachutes to be delivered to or for the account of the Army, Navy or Weather Bureau of the United States.

(ii) Any contract or order for silk in any form required by the person placing the same to fulfill his contracts or orders on hand, pro-

vided such silk is to be physically incorporated in material to be delivered under contracts or orders included under (i) above.

(iii) Any contract or order for raw silk placed by the Defense Supplies Corporation.

(2) Deliveries of imported raw silk may be made to any person importing the same, either directly or through an agent.

(c) *Restrictions on deliveries.* Notwithstanding anything in Priorities Regulation No. 1 to the contrary, no person shall hereafter sell or otherwise transfer title to, or make any deliveries, and no person shall purchase or accept delivery of Raw Silk except as provided in paragraph (b) hereof, unless specifically authorized by the Director of Priorities.

(d) *Restrictions on throwing, weaving and other processing.* (1) No person shall, during any week, knit, weave or otherwise process thrown silk in excess of the amount knit, woven or otherwise processed by him during the week ending July 26, 1941, unless specifically authorized by the Director of Priorities.

(2) No person shall throw, spin or otherwise process Raw Silk except as otherwise provided herein or unless specifically authorized by the Director of Priorities.

(e) *Reports.* Each person delivering or accepting delivery of Raw Silk in accordance with paragraph (b) hereof, or as specifically authorized by the Director of Priorities, shall, on or before the close of the next business day

following such delivery or acceptance notify the Textile Section Research Department, Office of Production Management, in writing, of the amount, the bale numbers, origin, denier size and color of any bales of Raw Silk so delivered or accepted, the names and addresses of the persons delivering and accepting delivery, and the identifying number or numbers of the War, Navy, or Commerce Department contracts in material delivered under which such Raw Silk is to be physically incorporated.

(f) *Appeal.* Any person who considers that compliance with this Order would work an undue hardship upon him may appeal by telegraph or mail to the Director of Priorities, Office of Production Management, Washington, D. C., setting forth the pertinent facts and the reason such person believes that he is entitled to relief.

* * * * *

DONALD M. NELSON,
Director of Priorities.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. —

THE UNITED STATES, CROSS-PETITIONER

v.

EDWARD P. STAHEL & CO., INC., INTERSTATE HOSIERY MILLS, INC., LIBERTY LACE & NETTING WORKS, A CORPORATION, COOPER, WELLS & COMPANY, MAY MCEWEN KAISER COMPANY, OSCAR HEINEMAN CORPORATION, SAKURA MILLS, INC., C. J. ABEGG AND EMIL RINGGER, DOING BUSINESS AS ABEGG & COMPANY, REAL SILK HOSIERY MILLS, INC.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

On December 31, 1948, Edward P. Stahel & Co., and the other cross-respondents above named filed a petition for a writ of certiorari to review a judgment of the Court of Claims in No. 490. A brief in opposition to that petition is being filed by the United States.

The Solicitor General, on behalf of the United States, prays that, in the event the Court grants the petition in No. 490, but only in that event, a writ of certiorari be directed to the Court of Claims to review those parts of its judgment in which it is held (1) that there was a "taking" of cross-respondents' silk within the meaning of the Fifth Amendment, and (2) that, there being a taking, it occurred on October 16, 1941. The certified transcript of the record in No. 490 includes those portions of the record upon which this cross-petition is based.

OPINION BELOW

The opinion of the Court of Claims (R. 97) is reported at 78 F. Supp. 800.

JURISDICTION

The judgment of the Court of Claims was entered on June 28, 1948 (R. 109). Motions for a new trial were overruled on October 4, 1948 (R. 110). By an order of the Chief Justice, dated December 29, 1948, the time within which to file a cross-petition for a writ of certiorari was extended for a period of 60 days up to and including March 3, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether under the facts of this case the Court of Claims was correct in holding that there was a "taking" by the United States of cross-respondents' silk within the meaning of the Fifth Amend-

ment, and in therefore giving judgment for interest from the date of taking to the date of payment and carrying charges from the date of taking to the date of delivery.

2. Whether, assuming that there was a taking, the Court of Claims correctly held that the silk was taken on October 16, 1941 and that interest and compensation for carrying charges should run from that date.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are listed in the brief in opposition which the United States is filing in No. 490, and are set out in the appendix thereto. Amended Order M-22 issued by the Office of Production Management on October 16, 1941, is also set out in the Appendix to this cross-petition.

STATEMENT

The pertinent facts are fully set forth in the Brief in Opposition which the United States has filed in No. 490, and the Court is respectfully referred to that statement as setting forth the facts which are pertinent here.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that there was a "taking" of the silk of the nine cross-respondents within the meaning of the Fifth Amendment and that cross-respondents therefore were entitled to interest and carrying charges from the date of such "taking".

2. In holding, even assuming that amended Regulation M-22 of October 16, 1941, could be the basis for a "taking", that the taking occurred when the authority to place orders was granted rather than when it was exercised.

3. In holding, assuming either that the amendment of October 16, 1941, to the Office of Production Management's Order M-22 constituted a "taking" or that the exercise of such authority constituted a "taking", that there was a "taking" of the silk of cross-respondents Edward P. Stahel & Co., Inc., and Oscar Heineman Corporation.

REASONS FOR GRANTING THE WRIT

In the instant case, all of the cross-respondents have been paid the full amount which the Court of Claims found to be the value of the raw silk which the Government acquired either by purchase or requisition subsequent to October 16, 1941. The court below, however, has held that the amendment of October 16, 1941, to the Office of Production Management's Order M-22, which amendment provided that certain enumerated purchase orders calling for the use of silk were assigned a preference rating of A-10, and that acceptance of such orders "is required", constituted a taking of the cross-respondents' raw silk for public use. It accordingly awarded cross-respondents interest on the value of the silk from October 16, 1941, until the date of payment, and also allowed recovery for storage and handling charges from October 16,

1941 until the date the Government took possession of the raw silk. We submit that in so holding the court below erred. The amended order of October 16, 1941, was not a taking; even if it was the taking did not occur on that date; and, finally, in respect of two cross-respondents, their raw silk was not acquired under the October order but under an earlier and different one.

1. The two reasons given by the court below for holding that the issuance on October 16, 1941, of amended Order M-22 (Appendix, *infra*, p. 12) was a "taking", are that by the order the silk owners (1) were forbidden to deliver or use their raw silk except by authority of the Government and (2) were required to sell their silk, if so requested, to the Government or contractors furnishing certain designated supplies to the Government. It has already been pointed out in the Government's brief in opposition, p. 10, that a freezing order is not a "taking" within the meaning of the Fifth Amendment, and for the same reason we submit that no taking can be predicated upon the first of the two reasons set out above.

The second reason given also fails to support the finding of a "taking". The then-existing system of priorities shows that the "mandatory" words relied upon by the Court of Claims did not compel compliance, and the negotiations of the parties show that cross-respondents could have ignored the order and retained their silk. The "mandatory" words

relied on by the court below are "acceptance thereof is required." They appear in the Office of Production Management's amended Order of October 16, 1941;[1] in Part (b) of that order, any contract or order for raw silk placed by the Defense Supplies Corporation was "assigned a preference rating of A-10, and acceptance thereof is required". In Part (a), the provisions of Priorities Regulation No. 1[2] were "deemed a part of this Order, except in so far as they are inconsistent herewith". Priorities Regulation No. 1, issued by the Office of Production Management on August 27, 1941, provided that a "Defense Order" included a contract or order assigned a preference rating of A-10 or higher [§ 944.1 (b) (3)]. It also provided that "Defense Orders * * * must be accepted and fulfilled in preference to any other contracts or purchase orders for such Material (§ 944.2) and that "Defense Orders" need not be accepted:

> If the Person seeking to place the Defense Order is unwilling or unable to meet regularly established prices and terms of sale or payment, but there shall be no discrimination against Defense Orders in establishing such prices or terms. [§ 944.2(b)(2)].

It is known that the purpose of the quoted provision was to eliminate the very problem of just compensation under the Fifth Amendment which is

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[1] Appendix, *infra*, p. 13.
[2] Federal Register of Aug. 30, 1941 (6 Fed. Reg. 4489).

here raised.[3] Thus, the words relied upon by the lower court to support its view that compliance was necessary (R. 102-103), must be construed as circumscribed by the existing priorities system and in the light of Priorities Regulation No. 1. So construed, they mean that acceptance of such orders was required only in preference to unrated or lower rated orders and was not required at all where the one placing the order was unwilling or unable to meet the suppliers' regularly established prices and terms of sale. They cannot be construed as requiring delivery of the silk, for the Priorities Act at this time (the period prior and immediately subsequent to Pearl Harbor) contained no puni-

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[3] O'Brian and Fleischmann, *The War Production Board Administrative Policies and Procedures* (1944) 13 Geo. Wash. L. Rev. 1, 33-34: "The detailed statement of the conditions under which defense orders had to be accepted, incorporated in Priorities Regulation No. 1, was the result of long study and consideration of the legal and constitutional issues involved. The regulation provides that such orders must be accepted, only if the persons placing them are willing and able to meet the suppliers' 'regularly established prices and terms of sale.' By permitting the supplier to fix his own prices, the question of just compensation under the Fifth Amendment to the Federal Constitution was eliminated. It is clear that the regulation was a proper exercise of the power to allocate and distribute materials. It is equally clear under the precedents that the direction did not constitute a 'taking' under the Federal Constitution; but, in any event, the authorization to the supplier to fix his own prices eliminated the possibility of a claim that he was being deprived of just compensation. More perplexing problems under this provision have arisen since the enactment of the federal price legislation, and it later became necessary to adopt the interpretation that 'regularly established prices' may in no case exceed legal ceiling prices." The authors were General Counsel and Assistant General Counsel, respectively, of the War Production Board, formerly the Office of Production Management.

tive sanction,[4] and reliance was placed upon voluntary cooperation. A true taking would have necessitated an order at least equivalent in its mandate to that found in *Liggett & Myers Tobacco Co.* v. *United States,* 274 U. S. 215. There the Act granting authority to requisition was referred to and set out, language indicating a taking was used, and it was specified that the order was "to be accepted and filled in any event". The words "acceptance is required", circumscribed expressly as they were by the existing system of priorities, are in no way equivalent to the references to requisitioning statutes and language in the *Liggett & Myers* case, and thus do not make this order mandatory in the sense of constituting a "taking" because they leave the silk owner the right to retain his silk. The fact that the United States found it necessary four months later (February 10, 1942) to requisition 17,177 bales of raw silk (Finding 22, R. 69) confirms this view. The United States had not obtained that silk in spite of the fact that contracts, adopted for use under the authority of the amended Order M-22 of October 16, 1941, and paraphrasing its "mandatory" language, were sent to all known holders of raw silk in order that all of their silk might be purchased.[5]

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[4] Act of June 28, 1940, 54 Stat. 676, as amended, 54 Stat. 875, 55 Stat. 236. Not until March 27, 1942 was a failure to comply made punishable. 56 Stat. 177.

[5] Findings 19 and 20, R. 65, 68. The contract form and the accompanying letter sent out are set out in these findings and clearly show that the only words used which could support

The negotiations between the United States and certain silk owners clearly show as a matter of fact that the silk owners had the opportunity to accept or reject (Finding 32, R. 81; Finding 38, R. 85). Where a property owner is given the choice of handing over or of retaining his property, that property has not been "taken". Cf. *Walker & Co.* v. *United States,* 64 F. Supp. 135, 105 Ct. Cls. 553; *E. I. DuPont De Nemours & Co.* v. *Hughes,* 50 F. 2d 821 (C. A. 3).[6] We submit accordingly that there was at no time a "taking" of the silk of any of the cross-respondents within the meaning of the Fifth Amendment, and that they were not entitled to interest or to compensation for carrying charges as ordered by the Court of Claims.

2. Even if it be assumed that the "mandatory" words were sufficient to constitute a taking, we submit that such a taking did not occur on October 16, 1941, the date upon which amended Order M-22 was issued. The mere issuance of this order pro-

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taking were again those used in the Order of October 16, 1941. In both the form and the letter it was stated that the order had a preference rating of A-10 and that therefore acceptance was mandatory.

[6] In the *Walker* case, and in the instant case the Government was employing the policy (also used in the *DuPont* case, *supra,* under the Lever Act) of attempting to obtain the property involved by means short of requisitioning before actually employing the power to requisition. This policy is underscored by the third condition precedent to an exercise of the requisitioning authority as set out in the Act of October 16, 1941, 55 Stat. 742, which states that it must be determined that, "all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted . . .".

viding that silk owners must accept orders for silk *if requested,* at the very most merely authorized the placing of "mandatory orders" each of which would amount to a "taking". Until that authority was exercised, the cross-respondents would retain possession of and title to their silk and there was no direct invasion of their property amounting to a taking. The authority might not be used, might be amended, or might be rescinded entirely. The property might have been taken under other authority (55 Stat. 742). A "taking" does not occur by the mere granting of authority to "take", but must await the definite exercise of that authority. *Danforth* v. *United States,* 308 U. S. 271, 286. *United States* v. *Sponenbarger,* 308 U. S. 256, 267.

We submit that if there was a taking, it could not have occurred before the date upon which the authority was exercised, December 23, 1941,[7] and therefore that the interest and compensation for handling charges ordered by the judgment would not begin to accrue until this time.

3. If it be assumed either that the issuance of amended Order M-22 constituted a "taking", or that the exercise of the authority thereby granted constituted a "taking", there was no taking as to cross-respondents Edward P. Stahel and Co. and Oscar Heineman Corporation who accepted contracts (Findings 30, 43, R. 80, 89) which con-

[7] On this day the orders issued under authority of amended Order M-22 were sent to holders of raw silk. Finding 20, R. 68.

tained no "mandatory" language whatsoever, and which were adopted for use and sent to raw silk holders on September 1, 1941 (R. 62), before the issuance of amended Order M-22 on October 16, 1941 (Finding 18, R. 62). The Court of Claims in its opinion held that this was not important because (1) the orders were accepted after October 16 and it was the "rule" then that acceptance was required, and (2) if they had not executed this form they would have received the "mandatory" form sent out on December 23, 1941. 78 F. Supp. 804. The rule referred to by the court, that acceptance was required, flowed directly from amended Order M-22, and obviously was confined to orders placed under the authority of that order. The other reason given also fails to support the court's conclusion. The fact that property may be requisitioned if a contract is not accepted is no ground for finding a requisition where the contract is accepted. *E. I. DuPont Co.* v. *Hughes,* 50 F. 2d 821, 825 (C. A. 3). We submit that the finding of the Court of Claims that the contracts sent to these two cross-respondents were "mandatory", and therefore constituted a "taking", rests on a supposition of what could have happened, rather than upon the facts which clearly show as to these two cross-respondents that there was no "taking", and that they are therefore not entitled to the interest and compensation for handling charges awarded by the judgment.

The orders and procedures relating to the purchase or requisition of raw silk in 1940 and 1941 will not, so far as we are able to perceive, have any relevance to the purchase or "taking" of other types of supplies. While we regard the questions raised herein as incorrectly decided below and as having importance in this case, we do not urge upon the Court the granting of this cross-petition in the event that the petition for certiorari is denied in No. 490. On the other hand, if certiorari is granted in No. 490, we urge that the judgment of the Court of Claims should also be reviewed on the the questions discussed above.

CONCLUSION

For the reasons stated, but only on the condition suggested above, it is respectfully submitted that this cross-petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH, 1949.

APPENDIX

The following Amendment to General Preference Order M-22 was issued by the Office of Production Management on October 16, 1941 (6 F. R. 5290):

Amendment to General Preference Order No. M-22 to Conserve the Supply and Direct the Distribution of Silk.

Whereas, the uncertainty of future shipments of raw silk from abroad and national defense requirements for silk have created a shortage thereof and it is necessary in the public interest and to promote the defense of the United States to conserve the supply and to allocate the said supply in the manner and to the extent in this Order provided;

Now, therefore, it is hereby ordered, That: General Preference Order No. M-22 is hereby amended to read as follows:

§ 963.1 General Preference Order No. M-22 —(a) *Applicability of Priorities Regulation No. 1.* All of the provisions and definitions of Priorities Regulation No. 1, issued by the Director of Priorities on August 27, 1941, shall be deemed a part of this Order, except in so far as they are inconsistent herewith.

(b) *Required and permitted deliveries.* (1) The following orders are hereby assigned a preference rating of A-10, and acceptance thereof is required:

(i) Any contract or order for silk cloth, shroud lines, tape or thread for either life, materiel, or flare parachutes placed by the War

Department, the Navy Department, or the Department of Commerce for such parachutes to be delivered to or for the account of the Army, Navy or Weather Bureau of the United States.

(ii) Any contract or order for silk in any form required by the person placing the same to fulfill his contracts or orders on hand, provided such silk is to be physically incorporated in material to be delivered under contracts or orders included under (i) above.

(iii) Any contract or order for raw silk placed by the Defense Supplies Corporation.

(2) Deliveries of imported raw silk may be made to any person importing the same, either directly or through an agent.

(c) *Restrictions on deliveries.* Notwithstanding anything in Priorities Regulation No. 1 to the contrary, no person shall hereafter sell or otherwise transfer title to, or make any deliveries, and no person shall purchase or accept delivery of Raw Silk except as provided in paragraph (b) hereof, unless specifically authorized by the Director of Priorities.

(d) *Restrictions on throwing, weaving and other processing.* (1) No person shall, during any week, knit, weave or otherwise process thrown silk in excess of the amount knit, woven or otherwise processed by him during the week ending July 26, 1941, unless specifically authorized by the Director of Priorities.

(2) No person shall throw, spin or otherwise process Raw Silk except as otherwise provided

herein or unless specifically authorized by the Director of Priorities.

(e) *Reports.* Each person delivering or accepting delivery of Raw Silk in accordance with paragraph (b) hereof, or as specifically authorized by the Director of Priorities, shall, on or before the close of the next business day following such delivery or acceptance notify the Textile Section Research Department, Office of Production Management, in writing, of the amount, the bale numbers, origin, denier size and color of any bales of Raw Silk so delivered or accepted, the names and addresses of the persons delivering and accepting delivery, and the identifying number or numbers of the War, Navy, or Commerce Department contracts in material delivered under which such Raw Silk is to be physically incorporated.

(f) *Appeal.* Any person who considers that compliance with this Order would work an undue hardship upon him may appeal by telegraph or mail to the Director of Priorities, Office of Production Management, Washington, D. C., setting forth the pertinent facts and the reason such person believes that he is entitled to relief.

* * * * *

DONALD M. NELSON,
Director of Priorities.

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No. 623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

THE UNITED STATES, *Cross-Petitioner,*

v.

EDWARD P. STAHEL & CO., INC., INTERSTATE HOSIERY MILLS, INC., LIBERTY LACE & NETTING WORKS, a Corporation, COOPER, WELLS & COMPANY, MAY McEWEN KAISER COMPANY, OSCAR HEINEMAN CORPORATION, SAKURA MILLS, INC., C. J. ABEGG and EMIL RINGGER, Doing Business as ABEGG & COMPANY, REAL SILK HOSIERY MILLS, INC., *Cross Respondents.*

On Cross-Petition for Writ of Certiorari to the Court of Claims.

BRIEF FOR EDWARD P. STAHEL & CO., INC., et al. IN OPPOSITION.

WILLIAM A. ROBERTS,
Attorney for Cross-Respondents.

Of Counsel:

IRENE KENNEDY,
WARREN WOODS,
ROBERTS & McINNIS,
735 Transportation Building,
Washington, D. C.

April 4, 1949.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Cross-Petition for Writ of Certiorari to the Court of Claims.

BRIEF FOR EDWARD P. STAHEL & CO., INC., et al. IN OPPOSITION.

PRELIMINARY STATEMENT.

On December 31, 1948, the cross-respondents, Edward P. Stahel & Co., Inc., et al., filed a petition for a writ of certiorari to review a judgment of the Court of Claims in No. 490.

On March 3, 1949 the Solicitor General, on behalf of the United States, respondent in No. 490, filed a cross-petition

for a writ of certiorari to review certain parts of the same judgment of the Court of Claims which this Court was asked to review in the petition for a writ of certiorari in No. 490. The cross-petition is conditioned upon the granting of the petition for a writ of certiorari filed in No. 490 by the present cross-respondents. If the petition for certiorari in No. 490 is denied, the cross-petition states that the granting of the cross-petition is not urged.

The cross-petition asks this Court to review the decision of the Court of Claims that: (1) there was a "taking" of cross respondents' raw silk within the meaning of the Fifth Amendment, and (2) that the taking occurred on October 16, 1941. The cross-petition urges that there was no "taking", and that even if there was a "taking" it did not occur on October 16, 1941, but rather on the dates of actual delivery to the Government on specific order.

It is submitted that the question of whether there was a "taking" in the constitutional sense is not an additional issue as it is inherent in the matters presented in the petition for a writ of certiorari in No. 490. It was not discussed extensively therein because the same question was disposed of by the Court of Claims in overruling demurrers filed to the original petitions, and because after the subject had been covered fully by the parties in briefs and in oral argument at trial, the Court of Claims handed down a unanimous decision that there was a "taking".

The only purpose of raising the issue on the date of the "taking" is to reduce the amount of interest and carrying charges which the Court of Claims found the United States was required to pay the claimants. This issue could be presented by the United States in connection with the contention of the petitioners in Case No. 490 that the Court of Claims erred in finding that the date of the taking was October 16, 1941. The entire issue as to date of taking is raised by the cross-respondents' original petition for certiorari in No. 490, a principal issue therein being the pro-

priety of the acceptance of the October 16, 1941 date by the Court of Claims.

The issues raised by the cross-petition are not new and are incidental to and/or inherent in the issues raised by the petition for writ of certiorari in No. 490. The cross-petition is not seriously urged since it is conditional upon the granting or denial of the petition in No. 490.

The cross-petition of the Government, filed simultaneously with its brief in opposition to the petition for certiorari in No. 490, is an attempt to deny the necessity for review by this Court and, at the same time, to establish a defensive status in the cross-respondents. Under such circumstances there is no provision under the rules of this Court permitting the filing of a cross-petition.

The certified copy of the record in No. 490 includes the portions of the record upon which cross-respondents in their brief in opposition to the cross-petition for a writ of certiorari rely.

OPINION BELOW.

The opinion of the Court of Claims (R. 97 in case No. 490) is reported at 78 F. Supp. 200.

JURISDICTION.

The judgment of the Court of Claims was entered on June 28, 1948 (R. 109). Motions for a new trial were overruled on October 4, 1948 (R. 110). A petition for a writ of certiorari was filed on December 31, 1948. A cross-petition for a writ of certiorari was filed on March 3, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED.

I. Was there a "taking" of cross-respondents' raw silk for public use within the meaning of the Fifth Amendment?

II. If there was a "taking", was the date of the "taking" October 16, 1941?

III. Was there a "taking" of the raw silk of two of the cross-respondents which was delivered on D. S. C. Silk No. 1 form of order after October 16, 1941?

STATUTES, REGULATIONS AND ORDERS INVOLVED.

The pertinent portion of the Fifth Amendment to the Constitution of the United States is as follows:

> ". . . nor shall private property be taken for public use, without just compensation."

Section 2 of the Act of June 28, 1940 (54 Stat. 676) as amended by the Act of May 31, 1941 (55 Stat. 236) is set out in Appendix A at page 13 of the petition for writ of certiorari in No. 490.

Executive Order No. 8734 (6 F. R. 1917), issued on April 11, 1941, is set out in Appendix B at page 14 of the petition for writ of certiorari in No. 490.

General Preference Order M-22 (6 F. R. 3731) issued by the Office of Production Management on July 26, 1941, is set out in Finding 9, R. 51, in No. 490.

Amendment of October 16, 1941 to General Preference Order M-22 (6 F. R. 5290) is set out in Finding 14, R. 58, in No. 490.

Price Schedule No. 14 (6 F. R. 3892) issued by the Office of Price Administration and Civilian Supply on August 2, 1941 is set out in Finding 12, R. 53-56, in No. 490.

STATEMENT.

On July 26, 1941, the cross-respondents were the owners of raw silk which they allege was taken by the United States for public use.

Prior to July 1941 the United States had considered creating a stockpile of raw silk. It entered into an agreement for the purchase of 50,000 bales at certain specified prices, but because of the rise in the market price of silk

beginning on July 21, 1941 it withdrew its offer to purchase on July 24, 1941 (R. 69, 70).

Prior to July 1941 the United States, as part of its defense program, had created the Office of Production Management, with authority to function with respect to assuring adequate supplies of materials needed for defense, and the Office of Price Administration and Civilian Supply, with power to determine maximum prices and with power in the price filed coordinate with that of the Office of Production Management in the field of industrial organization. As of July 26, 1941 a joint Committee of both offices existed for the purpose of coordinating policies with respect to vital commodities, including silk (R. 52).

On July 26, 1941 the President, by Executive Order No. 8832, terminated all commercial relations in raw silk with Japan (R. 50); the Office of Production Management issued General Preference Order M-22 which prohibited the delivery or acceptance of raw silk without the specific authorization of the Director of Priorities (R. 51); trading in raw silk on the Commodity Exchange was suspended at the request of the Administrator of the Office of Price Administration and Civilian Supply (R. 52); and the Price Administrator announced that within a few days his office would fix a price ceiling on raw silk at the level prevailing in the market on July 21, 1941 (R. 52). On August 2, 1941 Price Schedule No. 14 was issued which established maximum prices on raw silk (R. 53-56). The enforcement clause of this price-fixing order threatened public censorship for those who failed to comply with the terms of the order (R. 54). The maximum prices were vigorously protested by members of the silk industry but the price-fixing agency refused to make any change in the prices (R. 71, 72).

On October 16, 1941 General Preference Order M-22 was amended to *require* acceptance of orders given a preference rating of A-10, including any order for raw silk placed by the Defense Supplies Corporation (R. 60). All of the raw silk involved in this proceeding was delivered to the Defense

Supplies Corporation after the October 16, 1941 order was promulgated which required the owners to sell their silk, upon request, to Government contractors for parachutes, or to the Defense Supplies Corporation, and forbade owners to use their silk unless specifically authorized by the Director of Priorities (R. 101). With the exception of 120 bales (R. 80, 89), all of the raw silk of cross-respondents was delivered on D. S. C. Silk No. 3 form which expressly stated that acceptance of the order was mandatory (R. 66).

After July 25, 1941, and continuing until after the termination of the war, raw silk was purchased and sold only in accordance with and for the uses prescribed by Government regulations (R. 52). By February 18, 1941 all stocks of silk in the country had been acquired by the United States Government or were in the hands of Government contractors. For this reason Price Schedule No. 14, which had established the ceiling price on raw silk, was revoked and was never reissued (R. 62).

For a more complete statement reference is made to the facts set forth in Petition for a Writ of Certiorari, pages 3-10, in No. 490.

SUMMARY OF ARGUMENT.

The Court of Claims unanimously and correctly found that there was a "taking" by the United States of cross-respondents' raw silk within the meaning of the Fifth Amendment requiring the payment of just compensation. The acts of the United States in their entirety were an appropriation of cross-respondents' property and constituted as a matter of law a "taking" for public use.

The Court of Claims also unanimously held that the "taking" occurred on October 16, 1941. The cross-respondents have taken the position that the date of the "taking" was July 26, 1941. In any event, the "taking" did not occur later than October 16, 1941 when General Preference Order M-22 was amended so as to require the owners of silk to sell their property to the Government or its designee for Government use.

As found by the Court of Claims, there was a "taking" of the raw silk of two of the cross-respondents who delivered their silk on D. S. C. Silk No. 1 form after October 16, 1941.

ARGUMENT.

I. There Was a "Taking" of Cross-Respondents' Raw Silk Within the Meaning of the Fifth Amendment.

Since the filing of the original petitions in the fall of 1945, the United States has contended that the restrictions and regulations placed on cross-respondents, raw silk did not constitute a "taking", but were valid exercises of its sovereign powers with no resulting liability for just compensation. The United States demurred to the petitions and presented its position in its demurrer brief and in oral argument on the demurrer before the Court of Claims. The Court overruled the demurrers on November 7, 1945 (R. 41). In Defendant's Brief, filed March 1, 1948, the United States again advanced its contentions and subsequently argued its position at the trial of the case. The Court of Claims refused to accede to the argument of the United States and unanimously found that there had been a "taking" of cross-respondents' raw silk for public use with the attendant liability for the payment of just compensation. The same contention that there was no "taking" is the primary issue in the present Cross-petition for Writ of Certiorari.

1. On or before July 26, 1941 the United States knew that raw silk would be needed in carrying out its defense program and planned to use the available stocks of raw silk for military purposes.

After the declaration of war in Europe in 1939, the United States entered upon a defense program. Knowing that silk was the basic material needed for the manufacture of parachutes and powder bags, several months prior to July 1941 it considered the advisability of creating a stockpile of

this vital commodity. Negotiations were entered into with one of the leading silk dealers for the purchase of 50,000 bales of raw silk by Defense Supplies Corporation, an agency of the United States. The terms of purchase were agreed to and confirmed in writing on July 10, 1941. Before the purchase was consummated the market price of silk started to rise and increased above the level of the prices initially agreed upon for the silk. The purchase agreement was thereupon revised. When the Government found that it could not purchase the silk in the market for the price it had offered to pay, as late as July 24, 1941 it abandoned its plan to purchase as an ordinary trader in a market open for commercial transactions. It did not, however, abandon its plan to acquire the silk. A few days later, by governmental action, all raw silk was frozen, trading was suspended and a ceiling price fixed. The United States was no longer restricted in the amount of silk it could obtain or subjected to market prices. It had eliminated all competition. It could and did get all stocks of silk for its own use at its own price. As Donald Nelson, Director of Purchases, Office of Production Management, stated in a press release on August 7, 1941:

> "There was only one sensible thing to do and we did it. While there was still time, we made certain that our Army and Navy would have all the silk they need." (Office of Emergency Management, release PM 886).

It must be conceded that the Government formulated a defense program because it foresaw that we might become involved in the European war. In furtherance of its defense program it was necessary that the Government have an adequate supply of materials necessary for defense purposes. On January 7, 1941 the Office of Production Management (OPM) was established by Executive Order No. 8629 and given allocation and priority authority. On April 11, 1941, Executive Order No. 8734 established the Office of Price Administration and Civilian Supply (OPACS) with

authority in the price field to work with the Office of Production Management, and also set up a Price Administration Committee with the Administrator of the OPACS as Chairman and the Director General and Associate Director General of OPM as members of the Committee. The purpose of this Committee was to coordinate prices with respect to vital commodities including silk (R. 52). Both the OPACS and the OPM knew the importance of silk to the war effort and were cognizant of the advantage to the Government of a market controlled through allocation and price fixing mediums. The United States contends that there was no coordination between these two Government departments with respect to the policy to be followed and the actions taken in acquiring raw silk for military needs. We submit that such a contention is not plausible. To assume that the two departments did not coordinate would be counter to the presumption that attaches to governmental action and would not be in accordance with the idea of efficient and coherent action of our Government in times of emergency.

In support of our position that the Government had a plan to obtain the raw silk consideration should be given to the steps taken by the OPM and the OPACS.

The Price Fixing Division of OPACS had been watching the movement in the market prices of silk, but while normal relations existed with Japan it felt that the establishment of a ceiling price would endanger the country's supply of silk (R. 187). When the President, by Executive Order No. 8832, terminated commercial relations with Japan on July 26, 1941, the Government, through its priority and price control agencies, the OPM and the OPACS, diverted all stocks of raw silk from civilian use and acquired it for its own use at an advantageous price. As stated, on July 24th it had cut short its agreements for normal purchases.

On July 26, 1941, the two departments acted almost simultaneously. OPM issued General Preference Order M-22 prohibiting the use or delivery of raw silk without the

authorization of the Director of Priorities. All raw silk was frozen under this order and could not be consumed or delivered. OPACS caused the suspension of trading in silk on the Commodity Exchange and announced that within a few days a ceiling price would be imposed at approximately the market price on July 21, 1941 (R. 51, 52, 53). The determination to control the price of silk was made in order that the cost to the Government of its end products, parachutes and powder bags, could be kept low (R. 190).

On August 2, 1941, OPACS issued Price Schedule No. 14 and set a ceiling price of $3.08 per pound on the standard grade of raw silk, which price was approximately fifty cents below the market price on July 25, 1941, the last day silk was traded in. All raw silk in this country on July 26, 1941 was thereafter acquired for Government use at the ceiling price. None of it was sold for civilian consumption.

The priority order of July 26, 1941 was subsequently amended. The amendment of August 2, 1941 forbade the processing of any raw silk unless specifically authorized by the Director of Priorities (R. 53). That of August 12, 1941 authorized delivery of raw silk to or pursuant to the instructions of the Defense Supplies Corporation without further authorization (R. 58). The amendment of October 16, 1941 expressly *required* delivery of silk on orders having a preference rating of A-10, including orders placed by Defense Supplies Corporation (R. 58). Further amendments were made on October 28, 1941 and February 10, 1942 (R. 60, 61).

On February 18, 1942, the OPA issued an order revoking Price Schedule No. 14 and it was never reissued because there was no silk left in the hands of private owners. It had all be requisitioned (R. 191).

The refusal of the United States to pay the market price for silk which it had contracted to purchase, the presumption of regularity in the functioning of Government departments established to function with respect to commodities needed for defense purposes, and the sequence of actions

taken by the OPM and the OPACS clearly lead to the conclusion that the Government had a plan and purpose to divert all available silk from civilian use and appropriate it for its own use and benefit in fulfillment of military needs. The Office of Production Management admitted such a plan. A press release, PM 1291, issued October 2, 1941 by that office states:

> "OPM has no program to import more silk at this time and knows of no movement to bring more in. Any importation of silk in the future will depend on a number of factors, none of which can be determined at this time. *Meanwhile, OPM is proceeding with the original plan to use the stocks of frozen silk for defense purposes.* . . . All raw silk was frozen under Order M-22, as of July 26, 1941, and all such silk is still frozen under this order." (Italics supplied)

2. General Preference Order M-22 was not a regulatory order in the public interest but was in effect a requisitioning order.

a. *General Preference Order was not an exercise of the power of allocation for the public welfare.*

In furtherance of the defense program in a period of national emergency, Congress on May 31, 1941 (55 Stat. 236) amended section 2 of the Act of June 28, 1940 (54 Stat. 676). The Act of May 31, 1941 gave the President authority to *allocate* material needed for defense upon such conditions and to such an extent as he might deem necessary.

When the United States found that it was inexpedient to create a stockpile of raw silk at the prevailing market prices, it took the first step to effect the acquisition of silk for its own use by freezing the entire supply under General Preference Order M-22 issued by the OPM on July 26, 1941. This order prohibited delivery or processing of raw silk without the specific authorization of the Director of Priorities and its purpose was stated to be, "To Conserve the Supply and Direct the Distribution of Silk." The order

was purportedly issued pursuant to authority conferred under the Act of June 28, 1940 as amended by the Act of May 31, 1941, referred to in the preceding paragraph.

This priority order of July 26, 1941 was not like other priority orders, issued under the authority of the same statute, which permitted critical materials to be *allocated equitably* among essential users for civilian consumption. The Government, under the guise of a priority regulation, took control of all of the raw silk for the purpose of acquiring it for its own use. It never intended that any of the silk was to be made available for civilian use.

General Preference Order M-22 was not a regulation for the *allocation* of raw silk within the meaning of that term or within the intendment of the statute which authorized allocation of materials needed for the national defense. The purpose of *allocation* is well stated in *Steuart & Bro., Inc.* v. *Bowles*, 332 U. S. 398, 404, 88 L. ed. 1350, 64 S. Ct. 1007, where Mr. Justice Douglas says:

> "The problem of the scarcity of materials is often acute and critical in a great war effort such as the present one. Whether the difficulty be transportation or production, there is apt to be an insufficient supply to meet *civilian needs* after military and industrial requirements have been satisfied. Thus without rationing, the fuel tanks of a few would be full; the fuel tanks of many would be empty. Some localities would have plenty; communities less favorably situated would suffer. *Allocation* or rationing is designed to eliminate such inequalities and to treat all alike who are similarly situated. The burdens are thus shared equally and limited supplies are utilized for the benefit of the greater number." (Italics supplied.)

The concept of allocation is an equitable distribution of a scarce material to meet civilian needs. It is not the freezing of the entire supply of a commodity with the purpose of acquiring it *in toto* for Government use. There can be no *allocation* of an *entirety*.

Under the order of July 26, 1941, raw silk was frozen not in anticipation of subsequent allocation of silk partly to civilian use, but in anticipation of subsequent appropriation by the Government for the public use. There is a difference between a regulation allocating materials among civilian consumers or diverting deliveries of scarce commodities from one person to another by the Government in the exercise of its sovereign power, and a regulation of deliveries of an entire supply of a commodity for consumption by the Government. An order which allocates a commodity among dealers and consumers or diverts it to *others* has been considered to be a regulation. But an order which restricts the use of private property and subjects it to 100 per cent diversion to the Government for public use is a "taking".

The Courts have recognized the distinction between a regulation for the public welfare and a "taking" of private property. In *William C. Atwater & Company* v. *United States,* 275 U. S. 188, 191, 72 L. ed. 229, 48 S. Ct. 90, the claimant's coal had been diverted to the Tidewater Coal Exchange by order of the Fuel Administrator. Claimant contended that his coal had been requisitioned. In finding that there was not a requisition this Court pointed out that none of the claimant's coal was consumed or appropriated by the Government, there was nothing to indicate that the taking was for public use, and that it was not the Government's purpose to acquire any of the claimant's property.

We agree with the contention of the United States that in the exercise of powers analogous to the police powers of the states it may impose regulations and restrictions on private property for the public welfare, without being liable for just compensation. We do not, however, agree that the Government can promulgate a regulation for the purpose of preempting all of the raw silk in the country for the fulfillment of military needs without being required to pay just compensation. As Mr. Justice Holmes says in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 415, 67 L. ed. 322, 326, 43 S. Ct. 158:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Likewise, we say in the instant case that the General Preference Order M-22 was not a regulation for the allocation of raw silk for the public welfare, but was a taking of raw silk for public use within the meaning of the Fifth Amendment.

b. *Deprivation of use of private property may amount to a "taking" without removal of possession or divestment of title.*

It has been argued by the United States that there could not have been a taking by virtue of General Preference Order M-22 because possession of and title to the raw silk was left in the owners until deliveries were made to the Defense Supplies Corporation after October 16, 1941. In answer to this argument we submit that it is a well established doctine supported by numerous decisions that the deprivation of use and enjoyment of property without divestment of title or possession may constitute a taking within the meaning of the Constitution. *United States* v. *General Motors Corp.*, 323 U. S. 373, 89 L. ed. 311, 65 S. Ct. 357; *United States* v. *Welch*, 217 U. S. 333, 54 L. ed. 787; *United States* v. *Lynah*, 188 U. S. 445, 470, 47 L. ed. 539. The Court in *United States* v. *Lynah, supra*, in holding that there was a taking within the constitutional sense states:

> "While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done, it is of little consequence in whom the fee is vested."

The effect of the order of July 26, 1941 was to give virtual control of all raw silk in the country on that date to the Government. No sales of silk were made after July 26, 1941 except in accordance with Government regulations (R. 69). No one but the Government or its contractors

were ever permitted to acquire or consume silk after that date (R. 124). The owners had to maintain their silk in their own possession at their expense and could not consume or deliver it except at the direction of the Government. At no time after July 26, 1941 did the owners exercise or could they have exercised any real right incident to ownership of their property. They could not trade in it because the market was closed. They could not select their buyers because of General Preference Order M-22. They could not fix the price because the Price Administrator announced that he would fix the price and did so. If they had not complied with General Preference Order M-22, the Government under the existing legislation could have seized their plants. If they had refused to hold their silk for the Government they would have been subjected to public censure for impeding the war effort. The only vestige of ownership left with the silk holders after July 26, 1941 was the obligation to pay insurance and storage charges for the silk which they were holding for the Government.

Certainly it would be difficult to find a case better suited than the instant case for the application of the doctrine that deprivation of use of private property constitutes a taking. The silk owners were deprived of the use of their property as a natural consequence of the deliberate, intended exercise of an asserted power of regulating the distribution of raw silk under the guise of a priority order.

c. *Authority for "taking".*

It has also been contended that there could have been no "taking" of the raw silk under General Preference Order M-22 of July 26, 1941 because it was not until the passage of the Requisitioning Act of October 16, 1941, 55 Stat. 742, that there was statutory authority for requisitioning. This contention should be given slight consideration since the principle is well established that the absence of statutory authority is no impediment to a finding that property has been taken by the Government where it is shown that action

in pursuance of a statute not authorizing the requisition of property results in an actual appropriation of property for public use. *United States* v. *Great Falls Manufacturing Company,* 112 U. S. 645, 656, 28 L. ed. 846, 5 S. Ct. 306; *United States* v. *Lynah,* 188 U. S. 445, 465, 47 L. ed. 539.

The United States needs no statutory authority to take property for public use. It can take it under its sovereign right of eminent domain. As Mr. Justice Brewer states in *United States* v. *Lynah, supra:*

> "All private property is held subject to the necessities of the Government. The right of eminent domain underlies all such rights of property:"

It might be added that on July 26, 1941 there was statutory authority for the requisition of plants of persons refusing to comply with priority orders for necessary supplies. Act of June 3, 1916, C. 134, Sec. 120, 39 Stat. 213, 214; Section 9 of the Selective Training and Service Act of September 16, 1940, 54 Stat. 892. Although there was no direct authority by statute to take the raw silk, if the Government had authority to take over the plants of those refusing to comply with orders for raw silk, there was also authority for taking the silk as part of the plant.

3. The forces that were at work subsequent to July 26, 1941, compelled the silk owners to deliver their silk for Government use.

The United States in its cross-petition alleges that there was no "taking" because the cross-respondents had a choice of handing over or of retaining their property. We take exception to such a statement and insist that under the existing circumstances, the silk owners had no alternative but to give the Government their silk.

From a business and economic standpoint, the cross-respondents could not have refused to deliver their silk for Government use. When silk was frozen on July 26, 1941, most of the silk owners had large inventories on hand and

heavy financial obligations to meet. Warehouse, insurance and other charges were piling up. Refusal to deliver would have made it necessary for the owners to borrow long term money with the prospect of financial disaster. (R. 144, 145, 174, 176). Because many of the manufacturers had used only raw silk for their products, they had no established position in the market for substitute fiber (R. 174). The prices of silk in forms other than raw silk were so high that it was impossible to fabricate it so that it could be sold in finished products (R. 176). The throwsters and manufacturers who had used raw silk were at the mercy of the Government which controlled allocation of substitute fibres, and the Government could withhold the special allocation of rayon from hosiery manufacturers who failed to comply with the silk regulation and orders. The silk owners, as business men, could not afford to be exposed to public censure, which was threatened, for refusal to hold their silk for delivery to the Government at the Government's fixed price.

From a patriotic standpoint the silk owners had no choice to accept or to reject orders for delivery for the use of the Government. The tenor of the times and the urgent need for raw silk for defense purposes were compelling factors which must lead to the conclusion that it would have been most unpatriotic, as well as impracticable, for the cross-respondents to have refused to comply with orders for delivery of their silk. Under the existing circumstances, rejection of the orders would have brought down on their heads the reprisals of the Government officials, and refusal to comply with them would have been unthinkable and was not required of the silk owners. "The law, as between the Government and those who deal with it, should be law that is possible to live by, not merely law that reads plausibly in the books." *Winn-Senter Construction Co.* v. *United States*, 75 F. Supp. 255, 260.

4. On and after October 16, 1941, delivery of raw silk for Government use was required.

On October 16, 1941, General Preference Order M-22 was amended to provide that certain orders, including those placed by Defense Supplies Corporation, were assigned a preference rating of A-10 and that acceptance of such orders was *required* (R. 58). The amendment also provided:

> "All of the provisions and definitions of Priorities Regulation No. 1, issued by the Director of Priorities on August 17, 1941, shall be deemed a part of this Order, *except insofar as they are inconsistent herewith.*" (Italics supplied)

Since the amendment reads that acceptance of orders having an A-10 rating "is required" without any further supplementation, it would seem that the provision of Priorities Regulation No. 1, cited in the cross-petition at page 6, with respect to "Defense Orders" that need not be accepted, would be inconsistent with the aforecited excerpt from the Amendment of October 16, 1941. Therefore, the contention set forth at pages 6 and 7 of the cross-petition does not seem to be well taken.

The Court of Claims unanimously held that by the Order of October 16, 1941, the United States took cross-respondents' silk for public use (R. 102). The device it employed for obtaining what it needed was the granting of priority for its own uses and making acceptance of requests to purchase for that use mandatory. The Court states:

> "But to say that when the Government forbids an owner of property to make any other use of it, and requires him to sell it, upon request, to the Government, or its designee who will use it for a Government purpose, is not a taking of the property for public use, would be to make the constitutional right contingent upon the form by which the Government chose to acquire the use of the property." (R. 102).

The Court recognized that the Government did not need to rely on statutory authority to requisition property which it needs for public use.

The silk involved in the instant proceeding was delivered on orders of Defense Supplies Corporation after the amendment of October 16, 1941, which required acceptance of such orders. With the exception of a small portion, all of the silk was delivered on D. S. C. Silk No. 3 form which specifically stated that acceptance was mandatory. The cross-respondents, in maintaining that the Defense Supplies Corporation orders were mandatory and were not voluntary agreements for delivery of their silk, relied on the decision of this Court in *Liggett & Myers Tobacco Co.* v. *United States,* 274 U. S. 215, 220, 71 L. ed. 1006, 47 S. Ct. 581, which held that there was a taking of plaintiff's property by eminent domain. In that case the plaintiff had delivered its tobacco products on a Navy order which stated that compliance was obligatory. The Navy Department had issued the order pursuant to Acts of Congress which empowered the President to place an order for war materials and authorized the requisition of property for public use. On the reverse side of the order, reference was made to the Acts of Congress. The United States, in its cross-petition, at page 8, stresses the point that the Defense Supplies Corporation form of order did not refer to any Act of Congress authorizing a requisition, and that for this reason the ruling of this Court in the *Liggett & Myers* case, *supra,* is not applicable. We fail to follow this reasoning. The D. S. C. orders were mandatory, and were issued pursuant to an amendment to General Preference Order M-22 which required acceptance. Furthermore, on October 16, 1941, Congress passed the Requisitioning Act (55 Stat. 742) which expressly authorized the requisitioning of materials needed for defense. Following the thought expressed by Mr. Justice Butler in the *Liggett & Myers* case, *supra,* we say that after October 16, 1941, there was statutory authority to take the raw silk and that it can be presumed that the silk would have been requisitioned if the owners had refused to

comply with the D. S. C. orders. It seems of no importance that the orders under which cross-respondents delivered their property for public use contained no reference to the Order of October 16, 1941 which required acceptance, or to the Act of October 16, 1941 which authorized requisitioning.

5. Summary.

Knowing that all available raw silk would be needed for military purposes, the United States planned to acquire it for those purposes. By the device of freezing the entire supply of silk under the purported authority of allocating necessary commodities in a national emergency, it issued the priority order of July 26, 1941, which deprived the silk owners of the use of their property, and which was a pre-emption of the entire stock of raw silk for public use. For all practical purposes, private ownership of raw silk ended on July 26, 1941, and thereafter the Government controlled the actual custody and delivery of raw silk. As found by the unanimous decision of the Court of Claims, there was a "taking" of cross-respondents' raw silk within the meaning of the Fifth Amendment.

II. The Taking of Cross-Respondents' Raw Silk Did Not Occur Later Than October 16, 1941.

The second issue raised by the cross-petition at pages 9 and 10 is that if there was a taking of cross-respondents' raw silk, the taking did not occur on October 16, 1941, and could not have occurred before December 23, 1941.

The cross-respondents have taken the position that the date of the taking was July 26, 1941. The arguments in support of this position have been fully presented in the brief in support of their petition for a writ of certiorari, beginning at page 56, in Case No. 490, and need not be repeated here.

It is argued in the cross-petition that the mere issuance of the Amendment to General Preference Order M-22 on October 16, 1941 at the most merely authorized the placing of "mandatory orders" each of which would amount to a

"taking", and that until the authority was exercised and the mandatory orders actually placed, there could be no "taking." The United States entirely overlooks the fact that it had exercised its authority over cross-respondents' property before October 16, 1941, and had invaded their rights of ownership beginning on July 26, 1941. Although neither title nor possession passed until the silk was delivered on the D. S. C. orders, this is no impediment to finding that the silk was taken before the placing of the mandatory orders for delivery. Property may be taken long before title passes, and in some instances it has been held that property has been taken when there never is a transfer of title or possession. The legal test of "taking" of property in the constitutional sense is not the passing of title nor physical delivery, but is the deprivation of effective ownership. The time when the taking occurred was the time when effective ownership ceased, which cross-respondents maintain was on July 26, 1941, because all they could do with their property from that time on was to hold it for the Government. The only difference between that date and October 16, 1941, the date of taking fixed by the Court of Claims, is that from the latter date, the owners could merely hold their silk until officially required to deliver it to certain specified Government agents. If, as cross-respondents maintain, they lost their effective ownership on July 26, 1941, they certainly had none on October 16, 1941.

The Government seems to think that October 16, 1941, was not the date of the taking, because the decision to use all of the silk could have been changed. It is sufficient that the order of October 16, 1941 was not changed and that the Government proceeded to take all of the silk under its original plan.

In its withdrawal to successive defense positions, the Government has urged that July 26, 1941 or any time prior to October 16, 1941, could not be the date of taking, because until the Requisitioning Act was passed on October 16, 1941, it had no specific statutory authority to requisition.

It then argues that October 16, 1941, could not be the date of taking, because taking does not depend upon statutory authority for requisitioning, but upon actual delivery. Adoption of such a view would mean that there could be no compensation for handling and storage charges or for interest on the funds invested in silk throughout any period, however protracted, during which an owner of silk was required to hold his property without the right to sell or use it, to report to the Government the amount, kind and situs of his silk holdings, and to await instructions as to its delivery to the one and only possible consumer, the Government. It would certainly be unreasonable and unjust to require the cross-respondents to bear the costs incident to holding of the silk for the government from July 26, 1941, until December 23, 1941, and relieve the United States of liability for such expenditures.

III. There Was a "Taking" of the Raw Silk of Two of the Cross-Respondents Who Delivered Their Silk on D.S.C. Silk No. 1 Form of Order.

In the cross-petition the third point that is argued is that there was no "taking" of 50 bales of silk delivered by Edward P. Stahel & Co., Inc. on December 18, 1941, and 70 bales delivered by Oscar Heineman Corporation on December 15, 1941, because the form of the order which was executed was D. S. C. Silk No. 1, which contained no "mandatory" language such as was contained in D. S. C. Silk No. 3 form.

It is submitted that the Court of Claims has fully and correctly disposed of this question when it said:

> "We think that the fact that two of the plaintiffs executed the form 'D. S. C. Silk No. 1' which did not say that acceptance of the order was required was not important. They did this many weeks after the order of October 16 had been issued, and it was the rule, whether recited on the form or not, that acceptance was required. If they had not executed the No. 1 form they

would, no doubt, within a few days have received the No. 3 form, as the other plaintiffs did, which form expressed the mandatory character of the order." (R. 103).

All silk owners had notice by the amendment to General Preference Order M-22, issued on October 16, 1941, that their silk must be surrendered upon request to holders of a priority rating of A-10, including the Defense Supplies Corporation. Having had this notice, it was unimportant whether form D. S. C. Silk No. 1 or D. S. C. Silk No. 3 was used.

CONCLUSION.

The issues presented by the cross-petition are so closely related to those raised in the petition for a writ of certiorari filed by cross-respondents in Case No. 490 that they can, and should, be considered under the original petition. It is, therefore, respectfully submitted that the cross-petition for a writ of certiorari should be denied.

WILLIAM A. ROBERTS,
Attorney for Cross-Respondents.

Of Counsel:
IRENE KENNEDY,
WARREN WOODS,
ROBERTS & MCINNIS,
735 Transportation Building
Washington, D. C.

April 4, 1949.